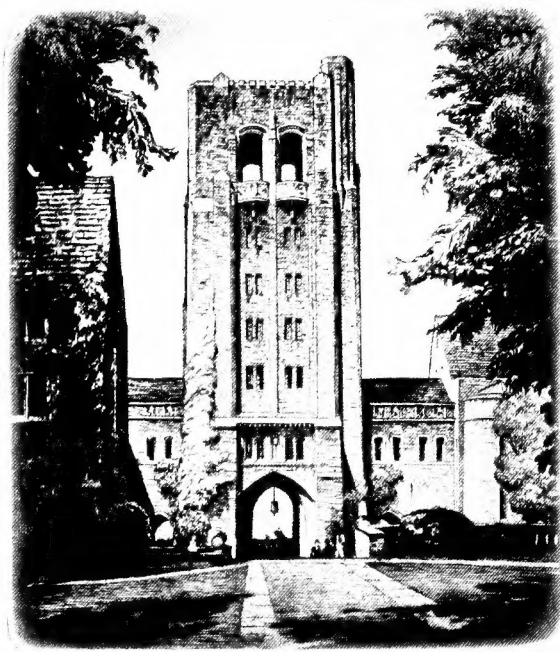
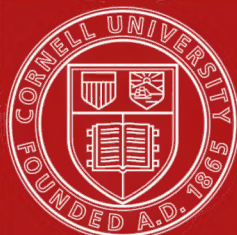






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GREAT AMERICAN LAWYERS



ALEXANDER HAMILTON

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Great American Lawyers

The Lives and Influence of Judges and
Lawyers Who Have Acquired Permanent
National Reputation, and Have
Developed the Jurisprudence of the
United States.

A HISTORY OF THE LEGAL PROFESSION
IN AMERICA

EDITED BY
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VOLUME I

PHILADELPHIA
THE JOHN C. WINSTON COMPANY
1907

B 2626

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PREFACE.

The aim of this work is not to present a mere collection of biographical sketches of great American judges and lawyers of the past, but to give a history of the development of legal institutions and an insight into social and political conditions existing in different parts of the country at practically every period of our colonial and national progress. It is hoped that taken separately each article will be found to give an account of the person written about sufficiently full to enable the reader to grasp his personality, a picture of the times in which he lived and the nature and character of his legal services.

The history of America, especially at critical periods, is so bound up with the personality of the leading members of the Bar, that a coherent series of monographs on the great judges and lawyers of the past will have an interest and value to every student of our history. To the educated lawyer the lives of those who in the past have reached a great place in the profession, enriching it, not only by their learning in the law, but by the bright example of their professional conduct, must always be a source of interest and inspiration.

Though primarily designed for lawyers and those interested in American history, the editor hopes that the work will meet the need of the teacher of law for

a series of short and readable articles on our great judges and lawyers to which he can refer his law students.

The reader will find that ninety-six names have been selected for treatment. No man or set of men, however familiar with the legal professional history of America, can select ninety-six names from the great number which claim recognition and say, "These are the ninety-six foremost names of our legal history." There are, indeed, judges like Marshall and Story, or lawyers like Webster and Benjamin, who would be in any list exceeding twenty in number; but no one can expect his list, be it large or small, to pass unchallenged. The present editor in making his selection, did not first determine on a number to be treated, as fifty or one hundred. The principles, therefore, on which the editor has made his selection should be stated. He did start with definite objects to be attained; some of these he abandoned as impractical, but the list as it stands may be said to be the result of an effort to fulfill the following aims:

First, to include the names of all those judges and lawyers who, as such, have acquired permanent national reputation.

Second, to include those who, while they may not have acquired permanent national professional reputation, have, because of their ability and judicial or professional opportunities, permanently impressed the jurisprudence of their respective states.

Third, to include those who have through their teaching or by their writings, produced, either a distinct effect on the law, or have been instrumental in stimulating new methods of legal thought and work.

Fourth, that the articles as a whole should give as complete a history as possible of the legal profession in America, and the development of our legal institutions.

The first desire has led to the selection of those names with whom educated lawyers and laymen everywhere are alike familiar; the second desire is responsible for the selection of those whose names, while perhaps not generally known, are household words to the profession in the state which was the scene of their labors; the third is responsible for the selection of those known only as great law writers and teachers, as Pomeroy, Hammond, Thayer and Langdell; the fourth, for such men as Andrew Hamilton, whose life gives us the only picture we have of the early colonial Bar, and Chancellor Livingston, whose selection has enabled the author of the article to give a clear account of the antagonism in colonial times to courts of Equity and the earliest successful establishment of such a court.

As originally planned, the list of those to be treated was to include the names of men who had made distinct contributions to our constitutional law, national or state, or had formulated and maintained theories of our Federal Constitution which had affected our history, even though they might not have

been prominent as judges or lawyers. The editor soon found, however, that to wander beyond the professional concept of a great lawyer was to enter a field with boundaries so indistinct that they could not be located with reasonable precision. Two articles, the result of his efforts in this direction, he has retained; one the article on Stephen A. Douglas, and the other that on Thomas Dorr of the famous Dorr War in Rhode Island. Douglas was at one time a judge; Dorr was a lawyer of ability; but the former was selected by the editor because of his arguments on our Federal Constitution as it affected the question of slavery in the territories; the latter because of his papers on a vital question of State Constitutional Law.

It does not adequately represent his feelings for the editor to say that he appreciates the work done by the contributors. He knows that there is not an article in this series which has not caused its author weeks of labor, while in many cases, where a great deal of original research has been necessary, the labor involved has been counted by months instead of weeks. He only hopes that the many suggestions which he has not hesitated to make, both before and after the receipt of the manuscript, and which in every case have been taken in good part, will be found not to have interfered with a full expression of the author's own ideas in his own way. Indeed, the reader will find that while all the writers have a common purpose,—to tell of the life and legal influ-

ence of their subjects,—the individual articles vary in length, in method of treatment, and in literary style. This, the editor believes, is as it should be.

One of the most interesting parts of his own work has been the collection of the pictures from which the illustrations have been made. In this he has had the assistance, not only of the contributors, but of a large number of others whom he has troubled continuously with numberless letters of inquiry. To all those who helped, too numerous for individual mention, he desires to express here his obligation. It was hoped that each article might be illustrated by a picture of the subject. This hope has been realized except in two or three instances where exhaustive search has failed to find an authoritative likeness. Perhaps it is because he has always been interested in such matters, but he feels that the reader will agree with him in thinking, that the attractive reproductions which the publishers have made of the pictures collected add greatly to the value and interest of the work.

LIST OF BIOGRAPHIES.

(Arranged in Order of Publication.)

Andrew Hamilton (1676-1741)

William Henry Loyd, Jr., of the Pennsylvania Bar.

George Wythe (1720-1806)

Lyon Gardiner Tyler, President of the College of William and Mary.

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Luther Martin (1748-1826)

Ashley Mulgrave Gould, Justice of the Supreme Court of the District of Columbia.

Theophilus Parsons (1750-1813)

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George DuRelle, of the Kentucky Bar.

William Wirt (1772-1834)

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John Marshall (1754-1835)

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James Gould (1770-1838)

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Jeremiah Mason (1768-1848)

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William Gaston (1778-1844)

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William Cranch (1769-1855)

Alexander Burton Hagner, ex-Justice of the Supreme Court of the District of Columbia.

Joseph Story (1779-1845)

William Schofield, Judge of the Superior Court of Massachusetts.

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Samuel Dreher Matlack, of the Pennsylvania Bar.

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William Elbert Wright, of Delaware.

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Eugenius Aristides Nisbet (1803-1871)

Joseph Rucker Lamar, ex-Justice of the Supreme Court of Georgia.

George Robertson (1790-1874)

Samuel Mackay Wilson, of the Kentucky Bar.

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- Henry Woodhull Green (1804-1876)
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- Isaac Fletcher Redfield (1804-1876)
William Brunswick Curry Stickney, of the Vermont Bar.
- John Appleton (1804-1891)
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- Charles O'Connor (1804-1884)
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Helen Katharine Hoy, of the New York Bar.
- Thomas Wilson Dorr (1805-1854)
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Armistead Churchill Gordon, of the Virginia Bar.
- Samuel Ames (1806-1865)
John Henry Stiness, ex-Chief-Justice of Rhode Island.
- Salmon Portland Chase (1808-1873)
*Eugene Wambaugh, Langdell Professor of Law in Harvard
 University.*
- Seargent Smith Prentiss (1808-1850)
John Handy Hall, of the Pennsylvania and Virginia Bars.
- Benjamin Robbins Curtis (1809-1874)
Joseph Bangs Warner, of the Massachusetts Bar.
- Abraham Lincoln (1809-1865)
William Eleroy Curtis, of Washington.
- Thomas Drummond (1809-1890)
Stephen Strong Gregory, of the Illinois Bar.

Jeremiah Sullivan Black (1810-1883)

Margaret Center Klingelsmith, Librarian of the Biddle Memorial Law Library of the University of Pennsylvania.

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John Bradley Winslow, Associate-Justice of the Supreme Court of Wisconsin.

George Sharswood (1810-1883)

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Francis Gordon Caffey, of the New York Bar.

George Franklin Comstock (1811-1892)

Thaddeus Davis Kenneson, of the New York Bar.

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Joseph P. Bradley (1813-1892)

Horace Stern, of the Philadelphia Bar.

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Edwin Jay Blandin, of the Ohio Bar.

Stephen Arnold Douglas (1813-1861)

Edward Osgood Brown, Justice of the Illinois Appellate Court.

Mercer Beasley (1815-1897)

James J. Bergen, Vice-Chancellor of New Jersey.

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Horace Stern, of the Philadelphia Bar.

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Morrison Remick Waite (1816-1888)

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Edwin Ames Jaggard, Associate-Justice of the Supreme Court of Minnesota.

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Samuel Mackay Wilson, <i>of the Kentucky Bar.</i>	George Robertson.
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Morris Wolf, <i>of the Pennsylvania Bar.</i>	Thomas Alexander Mar- shall.
William Elbert Wright, <i>of Middletown, Del.</i>	John Middleton Clayton.

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IOWA:	
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Samuel Freeman Miller	Horace Stern, <i>of the Philadelphia Bar.</i>
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William Pinkney	Alfred Salem Niles, <i>Judge of the City Court of Baltimore, Md.</i>
Roger Brooke Taney	William Ephraim Mikell, <i>Professor of Law in the Uni- versity of Pennsylvania.</i>
William Wirt	John Handy Hall, <i>of the Pennsylvania and Vir- ginia Bars.</i>
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Benjamin Robbins Curtis	Joseph Bangs Warner, <i>of the Massachusetts Bar.</i>
Horace Gray	Samuel Williston, <i>Weld Professor of Law in Harvard University.</i>
Christopher Columbus Langdell	James Barr Ames, <i>Dean of the Harvard Law School.</i>

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James Louis Petigru	Joseph Daniel Pope, <i>Dean of the Law Depart- ment of the University of South Carolina.</i>
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John Catron	Henry Hulbert Ingersoll, <i>Dean of the Law Depart- ment of the University of Tennessee.</i>
TEXAS:	
John Hemphill	Reuben Reid Gaines, <i>Chief-Justice of Texas.</i>

STATE AND SUBJECT.	AUTHOR.
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VIRGINIA:	
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Patrick Henry	Adele Cooper Scott, <i>of Washington, D. C.</i>
William Joseph Robertson	Armistead Churchill Gordon, <i>of the Virginia Bar; Rector of the University of Vir- ginia.</i>
John Randolph Tucker	William Reynolds Vance, <i>Dean of the Law Depart- ment of the George Wash- ington University.</i>
John Marshall	William Draper Lewis, <i>Dean of the Law Depart- ment in the University of Pennsylvania.</i>
George Wythe	Lyon Gardiner Tyler, <i>President of the College of William and Mary.</i>
WISCONSIN:	
Matthew Hale Carpenter	John Bolivar Cassoday, <i>Chief-Justice of Wisconsin.</i>
Edward George Ryan	John Bradley Winslow, <i>Associate-Justice of the Su- preme Court of Wiscon- sin.</i>

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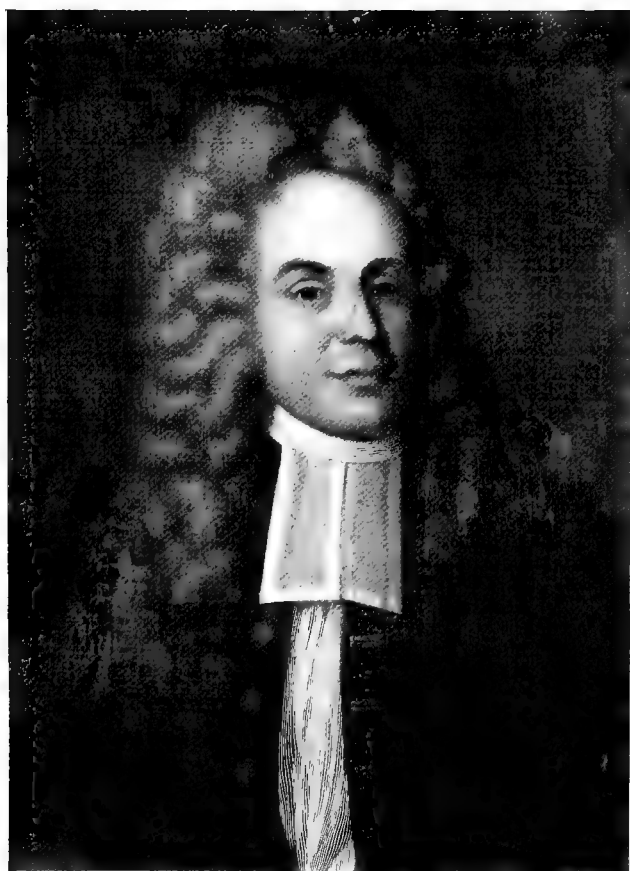
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ANDREW HAMILTON.

ANDREW HAMILTON

From a portrait by William Cogswell, in the Collection of the Historical Society of Pennsylvania. The Cogswell portrait was copied from a portrait by Wertmüller in possession of the Becket Family, descendants of Hamilton, residing in London.

The Wertmüller portrait was a copy of an earlier portrait since destroyed.



ANDREW HAMILTON.

1676-1741.

BY

WILLIAM HENRY LOYD, JR.,

of the Philadelphia Bar.

IT has been a subject of frequent remark that the colonial courts have left remarkably few memorials of their work of permanent interest and value. In a period of great legislative activity, of extremely practical and interesting administrative experiments, the silence of the judiciary is almost unbroken, and the industry of the antiquarian can yield but a few meagre traditions. To some extent this may be attributed to the absence of law reporters, the troubadours of the halls of justice. But the publishers of those days were enterprising men and, had the professional pride of bench and bar required it, or the importance of the litigation demanded it, quaint volumes of decisions might have issued from the presses of Bradford and Franklin displacing the curious theological tracts upon which so much literary industry was expended.

The reasons, however, for the obscurity that shrouds the history of the bench and bar of this early period attach to professional life in every new settlement. The country was largely a wilderness; the colonists usually poor, their only property half

cleared farms; commerce was controlled from the mother country; aside from public office, the prospects of gaining wealth and distinction were not such as to tempt ambitious and talented lawyers to try their fortunes in the new world.

Moreover the colonists, and this was particularly true in Pennsylvania, belonged largely to persecuted religious sects whose experience with the law in their former homes was not such as to inspire pleasant sentiments toward the courts and their officers. This resentment, coupled with utopian theories of government, may be traced in the early provincial legislation and disappears only with the second generation of emigrants. Among the "Laws agreed upon in England" drafted by William Penn and embodied in the "Act of Settlement" passed by the Provincial Assembly at Philadelphia, March 10th, 1683, was the provision "that in all courts all persons of all persuasions, may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves, or if unable, by their friends."¹ In 1685 an act was promulgated by the Provincial Council, *horresco referens*, "excluding attorneys from pleading for reward."² It failed to pass the assembly,³ but the oath of solicitors and attorneys as prescribed by the Act of January 12th, 1705, contained this clause,

¹ Charter and Laws of Pennsylvania, p. 128.

² Charter and Laws of Pennsylvania, p. 503.

³ Votes of Assembly of Pennsylvania, vol. I, 32.

"thou shalt increase no fees, but be contented with such fees which are or shall be allowed by the laws of this province."⁴ In the earliest period the more important causes were tried before the governor and council, while laymen for many years sat as judges in all the courts, receiving totally inadequate compensation for such services. The laws establishing courts were constantly altered and amended until the passage of the Act of May 22d, 1722, the first and only court law not repealed by action of the crown and which contained this concession, "that there may be a competent number of persons of an honest disposition, and learned in the law admitted by the justices of the said respective courts, to practice as attorneys there."

In the case of *Lyle vs. Richards*,⁵ it is remarked by Chief-Justice Tilghman that from what he had been able to learn of the early part of the history of Pennsylvania, it was a long time before she possessed lawyers of eminence; there were never wanting men of strong minds very well able to conduct the business of the courts but without much regard to the technical difficulties of the profession. Documents, inaccessible probably to the Chief-Justice, enable us to show that there was during the early years of the eighteenth century a considerable emigration of educated people to the province including several barristers-at-law qualified to practice in the courts of

⁴ II Statutes at Large of Pennsylvania, p. 270.

⁵ 9 Sergeant and Rawle's Reports, 322.

England. The public documents constantly reflect the working of acute legal minds, and if the courts exhibit a barren record it may be attributed to the inferior legal attainments of the judges who however capable, as amateurs, of administering a rough and ready sort of justice, were lacking in the professional skill and learning necessary to establish judicial renown.

Andrew Hamilton was one of the very few provincial lawyers so fortunate as to achieve a national and lasting reputation. The most eminent practitioner of his time in Pennsylvania and the adjoining colonies, the chief projector of the State House, afterwards to become world famed as "Independence Hall," his name would, perhaps, have sunk into oblivion had it not been for the notable part he took in the defense of the printer Zenger. By his bold assertion of the liberty of the press he created such a profound impression that he has, with some justice, been called by Gouverneur Morris, "the day star of the American Revolution."

Born supposedly in Scotland about 1676,⁶ the story of his parentage and early life is a secret which he carefully kept to himself and which it is now too

⁶ This is the date given by Joshua Francis Fisher in the article in the *Historical Magazine*, vol. IV, 2d Series (1868), reprinted in *Pennsylvania Magazine*, vol. XVI, 1, the best account of Hamilton's life. The historians, Benson J. Lossing and John Fiske, state that he was eighty years old at the time of the Zenger trial in 1735, which would place his birth at an earlier date. "Our Country," Lossing, vol. I, 368; "Dutch and Quaker Colonies in America," Fiske, vol. II, 255.

late to discover. As far as can be ascertained, he was of gentle blood and his education must have been excellent. The family tradition is that he had been obliged to fly from his native country on account of killing some one of importance in a duel, a romantic story for which no positive evidence is adduced. For a time he certainly was known by the name of Trent and this may have been his real name or one assumed to conceal his identity. Colonel Frank M. Etting in his history of Independence Hall suggests a relationship to Governor Andrew Hamilton who came to East Jersey in 1686 and died while lieutenant-governor of Pennsylvania in 1703. James Logan, the confidential agent of the Penns, in writing to Hannah Penn speaks of him as "once an acquaintance of his namesake our former governor." James Hamilton, his eldest son, used as a seal the arms of the Scotch family of Hamilton. On the other hand there were Trents in New Jersey and Pennsylvania, also from Scotland, to whom he may possibly have been related. At all events, the first certain information that we have is that when about of age he came to Accomac County on the eastern shore of Virginia, where he obtained employment and for a time kept a classical school. When he assumed, or resumed, the name of Hamilton is not known, but in 1706 the Reverend Francis Makemie, a Presbyterian minister there, bequeathed his laws' books to "Andrew Hamilton, Esq."⁷

⁷ Keith's, *Provincial Councillors*, p. 121.

The story is that his marriage with the widow of the owner of the estate for which he was steward brought him influential connections and he soon began to practice law. On March 26th, 1708, Andrew Hamilton described as of Northampton County, Virginia, purchased an estate in Kent County, Maryland, on the Chester river consisting of six thousand acres and known as "Henberry." Here he lived for a number of years and as his legal fame spread he practiced not only in Kent and the adjoining counties but as far north as Philadelphia.

In 1715 an Assembly was summoned to codify the laws of the province of Maryland and Hamilton was chosen one of the deputies from Kent County. He was late in his attendance and was fined, although he gave as his excuse that he was arguing before the Supreme Court of Pennsylvania and was away from his plantation. Nevertheless he was appointed a member of the committee on laws which codified the forty-six chapters of the Act of 1715, the substratum of the statute law of the province.⁸

By 1712 Hamilton had established a handsome practice and acquired considerable reputation for ability. Late in that year he was first retained by the agents of William Penn in a suit against Berkeley Codd, Esq., of Sussex County, Delaware. At a meeting of the commissioners, the Board of Property decided, "that an express be immediately sent

⁸ Pennsylvania Magazine, vol. XVIII, 405.

to Andrew Hamilton, a lawyer in Cecil County, Maryland, who generally attends our courts to engage him in the cause." The suit was a replevin where the Proprietary's point was, that, the quit rent due from Codd's land being a rent-service, distress was incident thereto of common right. Logan speaks of the case in the following letter to William Penn dated December 26th, 1712:

In that lett^r (one to Henry Gouldney) I mentioned a Replevin brought by one Berkly Codd, in Sussex, for wheat distrained on by Tho. ffisher, for Quittr^{ts}, by my Ord^{rs}. Codd was baffled at y^e Court by the Dexterity of our Lawyer's Management, without bringing the matter to Trial; for, indeed, I was altogether unwilling to bring in the Deeds of ffeofmt into Court, because of y^e Reservation of one half of the Rents to the Duke, & the Distress that is allowed to be made in case of thy failing to pay them.

And, again, on September 14th, 1713, writing to Hannah Penn, William Penn's wife, he says:

This comes by one And^r Hamilton, once an acquaintance of his namesake, our former Govern^r, an Ingenious man, and, for a Lawyer, I believe, a very honest one, & of very considerable Practice in these parts. 'Twas he we imploy^d in the business of the Replevin brought last Winter upon a Distress made in the County of Sussex for Quittr^{ts}, and he baffled them, tho' he thought not fitt to suffer it to proceed to a Trial, for want of better Tackle on our side. He will readily be assistant, I believe, in anything in his Power, but, designing a short stay, can doe little more than by Advice and Informations." ⁹

⁹ Pennsylvania Archives, 2d Series, vol. XIX, 543; vol. VII, 33, 43.

Shortly before this suit Hamilton determined to obtain admission to the English bar and with this object in view sailed for England in 1712. The records of Gray's Inn show that he was admitted a member of that learned society on the twenty-seventh of January, 1712, where he is designated as Mr. Andrew Hamilton of Maryland and on the tenth of February of the same year, he was *per favor* called to the bar, which means without keeping the usual terms.¹⁰ As his reputation extended his increasing practice naturally drew him to the city of Philadelphia, the commercial centre of the middle provinces, and there he finally made his home. About the time of his removal to the city of brotherly love a dispute of some sort with the governor resulted in the following indictment:

The grand inquest for our lord the king, upon their respective oaths and affirmations do present, that Andrew Hamilton, late of the County of Philadelphia, Esq., the tenth day of October, in the first year of the reign of our lord George etc. . . . at the city aforesaid, of the Honorable Charles Gookin, Esq., lieutenant governor of the province of Pennsylvania then and still being, the wicked, opprobrious and reproachful words following did speak, utter and pronounce, viz.: Damn him (the said lieutenant governor meaning). If he (the said Hamilton himself meaning) ever met the damned dog Gookin (the said lieutenant governor again meaning) out of the province in which the said Gookin had command, or any other convenient place, that by the eternal God he (the said Hamilton himself meaning) would pistol him, and that he (the said lieutenant governor again

¹⁰ Pennsylvania Magazine, vol. XVI, 3.

meaning) deserved to be shot or ript open for what he (the said lieutenant governor again meaning) had done already, and swore by God (he himself again meaning) that he could find the heart to do it, and would if he ever had him (the said lieutenant governor again meaning) in a convenient place, to the evil example of others in like case delinquent, and against the peace of our said lord the king his crown and dignity.¹¹

Hamilton gave bond in £1000 with Clement Plumstead, one of the council, as his surety but the case appears to have been dropped, so that it is impossible to say whether he really was guilty of the belligerent and profane expressions attributed to him in the indictment. Gookin, who is said to have owed his appointment to the fact that he was a "cheap governor," had made himself exceedingly unpopular during the last years of his administration. He had quarreled with the Assembly and leading Quakers, accusing Logan of Jacobite tendencies and was recalled in the following year, Sir William Keith succeeding to the office.

In 1717 Hamilton was appointed attorney-general of Pennsylvania,¹² which office he resigned in 1724 prior to a visit to England. As attorney-general he was included in the commission of the peace for Philadelphia and Bucks Counties.¹³ The Chester County justices however objected to the *ex officio* inclusion of the attorney-general in the quorum and a special commission in his favor was

¹¹ Wharton's Precedents of Indictments (1849), p. 568.

¹² Pennsylvania Archives, vol. IX, 2d Series, 649.

¹³ Pennsylvania Archives, vol. IX, 2d Series, 720, 763.

advised by the Council.¹⁴ In 1720 he was called to the Provincial Council, an office which he accepted on the express condition that his duties should not interfere with his law practice and although he remained a member for more than twenty years, until his death, he seldom took part in its deliberations. The only judicial office held by him was that of judge of the court of Vice-Admiralty, an appointment under the crown which he received in 1737 and which did not, apparently, exclude him from practice in the other courts.

Hamilton's visit to England between 1724 and 1726 appears to have been upon business of the Proprietors. It is said that he appeared in chancery for the formal proving of William Penn's will. It probably also had to do with the Maryland boundary dispute which culminated in the celebrated case of Penn vs. Lord Baltimore.¹⁵ This dispute, at times, assumed the serious aspect of a border warfare with rioting and arrests on both sides. During the tedious litigation he took a prominent part, as attorney for the Penns, in the local courts and as a commissioner at the various conferences with the Maryland authorities.¹⁶ He is also understood to have had a hand in preparing the terms of agreement of 1732 upon which the cause was subsequently brought be-

¹⁴ Colonial Records, vol. III, 617; vol. IV, 22.

¹⁵ I Vesey Senior's Reports, 444.

¹⁶ Pennsylvania Archives, (1st Series), vol. I, 428, 429, 434; Colonial Records, vol. III, 543, 547.

fore the Privy Council and upon which the final decree of Lord Chancellor Hardwicke was based.

Prior to his departure Logan writes in a letter to Henry Gouldney dated 3 mo. 7, 1723: ¹⁷

I mentioned in my last that And^r Hamilton designed speedily to come over thither. He now intends to take Shipping from N. York in the Beaver, about the latter end of this month, and I must particularly give you these hints concerning him: He has, for 3 or 4 years past, appeared very hearty in y^e Proprietor's Interest here, notwithstanding it is not his natural disposition to be on the side of those who are accounted Great or are in Power; but of late he has somewhat recoiled, and given more way to nature. He is very true where he professes friendship, unless he thinks himself slighted, which he cannot easily brook. He is a very able Lawyer, very faithful to his Client, and has generally refused to be concerned for any Plaintiff who appeared not to have Justice on his side. He has done many considerable services for our Governm^t, but of late they have openly been at variance, for which reason I am of opinion that he will not appear agst the Gov^r, for he is singularly generous that way. I have been much obliged to him, both on my own acco^t and the Proprietor's, and I heartily wish he may be treated there by the family in such a manner as may engage him, of which I am somewhat apprehensive. Upon y^e whole, I request that a prudent use may be made of what I have here taken the Liberty to mention.

It was at this time that the young printer, Benjamin Franklin, was persuaded to visit England on a fool's errand by his supposed friend, the governor. Speaking of this voyage he says, "Mr. Andrew Hamilton, a celebrated lawyer of Philadelphia, had taken passage on the same ship for himself and son."

¹⁷ Pennsylvania Archives, 2d Series, vol. VII, 81.

Owing to the number of passengers Franklin had been compelled to put up with a berth in the steerage, but Mr. Hamilton and his son returning from Newcastle to Philadelphia, "the father being recalled by a great fee to plead for a seized ship," Franklin was enabled to find accommodation in the cabin and with the other passengers enjoyed the goodly stores that the lawyer had laid in for the voyage.¹⁸ Who could have foretold the part this shrewd young observer was to play in the great revolution consummated in the building yet to be designed and erected by the lawyer to whom he refers—a revolution even then foreshadowed in this and other equally peaceful and prosperous colonies, where the differences with a distant government were magnified and embittered by the tactless and inefficient adventurers sent out to mend their broken fortunes as provincial governors.

Returning to Philadelphia December 12th, 1726, Hamilton received for his services to the Penn family a grant of one hundred and fifty-three acres of their manor of Springettsbury. This estate which received the name of "Bush Hill" now lies in the heart of the City of Philadelphia, comprising the whole space from Vine street to Fairmount avenue on the north and from Twelfth street to Nineteenth street on the west. There he built a handsome country seat, and there he resided until his death. There also lived his son, Lieutenant-Governor James Ham-

¹⁸ Autobiography of Benjamin Franklin.

ilton, and there too John Adams resided during his vice-presidency. Hamilton also acquired a large estate in Lancaster County upon which the town plot of the city of Lancaster was laid out in 1728, the ground rents reserved yielding a handsome income to his descendants. In the course of years the devolution of these estates gave rise to some of the most interesting questions of title ever brought before the Supreme Court of Pennsylvania.

In June, 1727, he was appointed master of the rolls, recorder of Philadelphia as well as prothonotary of the Supreme Court, to which office his son James succeeded in 1733.¹⁹ In October of the same year he was elected a member of the Assembly from Bucks County and was re-elected annually until his retirement in 1739, with the exception of a single session in 1733 when "Governor Gordon and he being 'at outs' owing to an unpleasantness between Miss Margaret Hamilton and the Misses Gordon, the governor exerted his influence against the return of Hamilton to the Assembly and had him defeated at the polls."²⁰ Later in the year, however, he was returned in the place of a deceased member and again took his seat.

From his entry into the Assembly Hamilton took a leading part in public affairs. His first appointment was upon a committee to draw up an address congratulating George II on his accession to the

¹⁹ Pennsylvania Archives, 2d Series, vol. IX 646, 716, 717.

²⁰ Keith's Provincial Councillors, p. 124.

throne ²¹ and he was thereafter the author of most of the addresses to the proprietors and to the English government and the draughtsman of the Acts of Assembly. In 1729 he was elected speaker and filled the chair, except in the year 1733, until his retirement. The confidence of the members in his integrity is shown in his selection as one of the trustees of the Loan Office and as one of the committee for the erection of the State House. In politics he seems to have assumed a position of complete independence. While staunchly supporting the liberties and privileges conferred upon the people by the enlightened benevolence of Penn, and vigorously opposing all encroachments by the governors upon chartered rights, he never allied himself with the, so called, popular faction but retained the confidence and good will of proprietors and their friends. An inspection of the statutes shows that the legislation of his time was much less important than that of prior and subsequent periods. Perhaps this was owing to his restraining influence. The legislation of Penn's time answered the needs of the new community and with few exceptions the laws passed during his speakership had to do chiefly with fiscal and other administrative matters. Among the exceptions is the Act of February 14th, 1730, a wise and, for those times, liberal act for the relief of insolvent debtors and the foundation of much subsequent legislation on that subject.

²¹ Votes of Assembly of Pennsylvania, vol. III, 36.

Less commendable, perhaps, was the attitude assumed by Hamilton and his colleagues in the Assembly toward the Court of Chancery. To meet the needs of the community Sir William Keith had in 1720, at the request of the Legislature, established this Court in which the governor presided as chancellor assisted by the six senior members of the Provincial Council.²² The most serious objection to the Court was the manner of its creation, by proclamation of the Governor without legislative action, and its proceedings were regarded with jealousy and suspicion although the amount of business brought before it does not seem to have been large. Petitions were presented against it to the Assembly,²³ which in January 1736 resolved that, as constituted, the court was contrary to the charter of privileges.²⁴ Objections were also made to the assumption of judicial functions by the Governor and Council and to the administration of equity in any other place than an ordinary court of justice. The Council, through Logan, made a voluminous report justifying their action and stating, incidentally, that before its establishment the Governor had taken legal advice including that of the then Attorney-General, Andrew Hamilton, "who was esteemed and allowed to be as able in that profession as any on the continent of America."²⁵ But the assembly firmly adhered to its

²² Rawle's Equity in Pennsylvania, p. 47.

²³ Colonial Records, vol. III, 617.

²⁴ Votes of Assembly of Pennsylvania, vol. III, 25.

²⁵ Colonial Records, vol. IV, 28, 38.

position, replying through Hamilton, as speaker, that the opinions of one or more lawyers, who were left to answer for themselves, in favor of the court was of no consideration in the case. Here the matter rested and the house adjourned without passing a bill, previously introduced, conferring equitable jurisdiction upon the provincial courts. Governor Gordon dying soon afterwards, his successors never attempted to exercise chancery powers. Pennsylvania lost this system of justice because, in the words of Horace Binney,²⁶ "her governor and representatives could not agree by whom the office of chancellor should be held." Thereafter for a century equity was administered in Pennsylvania through common law forms, to the detriment of orderly practice and the scientific development of the law.

From the laws of Delaware printed by Franklin in 1741 it would appear that Hamilton had occupied for one or more years a seat in the assembly of the three lower counties, now the state of Delaware. A number of important statutes have the signature of Andrew Hamilton as speaker. No date is given but being executed under Governor Gordon's administration they must have been prior to 1737. A search, however, for his name among such records of that early period as have been preserved has proved fruitless. A letter, quoted by Mr. Fisher, written by John French, speaker, to Andrew Hamilton, Esq.,

²⁶ Eulogy on Tilghman, Chief-Justice, 16 Sergeant & Rawle's Reports, p. 448.

dated March 15th 1726, and thanking him in the name of the representatives for his assistance during the session gives evidence of his having been employed in similar services at an earlier date.

Reference has been previously made to Hamilton's part in the erection of Independence Hall, to the modern reader, perhaps, the most interesting personal episode in his career. When Hamilton became a member, the sessions of the Assembly, as previously, were held at a private residence except when the Friends' meeting house was used. On May 1st, 1729, the Legislature took into consideration the necessity for a house for the Assembly of the province to meet in, and accordingly a bill appropriating two thousand pounds of the paper currency, then to be emitted, toward the building of the house was passed. The original draft of the bill with its interlineations and amendments in the handwriting of Hamilton has been preserved and a facsimile of it is printed in Colonel F. M. Etting's History of Independence Hall. The building commission consisted of Thomas Lawrence, Andrew Hamilton and Doctor John Kearsley. Third and Market streets had been suggested as a site, but Hamilton, preferring Chestnut street between Fifth and Sixth, purchased the ground conjointly with his wealthy son-in-law, William Allen, afterwards chief-justice, they taking title in their own names until the state should reimburse them.

Doctor Kearsley, who had acquired a reputation as

an architect, having planned and supervised the erection of Christ Church, expected to be entrusted with the new project and prepared a plan for the State House. Hamilton, however, conceived a plan of his own which was preferred and adopted by the commission, which also approved the site he had selected. The choice gave rise to some acrimonious discussion but, on being referred to the Assembly, that body on August 14th 1732, voted "that Mr. Speaker both in regard of the place whereon the building of the State House is fixed and his manner of conducting said building, hath behaved himself agreeable to the mind and intention of this House."²⁷ After this Hamilton appears to have assumed entire charge of the work, personally superintending its erection according to his design. The next year the two small wings were added to the plan.

The room for the Assembly was finished in 1736 and was first used by Allen for a grand banquet upon his retirement from the mayoralty. The *Pennsylvania Gazette* of September 30th, 1736, says: "Thursday last William Allen, Esq., Mayor of this city for the year past, made a feast for his citizens at the State House, to which all the strangers in town of note were also invited. Those who are judges of such things say that considering the delicacy of the viands and the excellency of the wines, the great number of guests, and yet the easiness and order with which the whole was conducted, it was the most

²⁷ Votes of Assembly of Pennsylvania, vol. III, 181.

grand and the most elegant entertainment that has been made in these parts of America." In the following month the first session of the Assembly was held there, but the interior was not fully completed until after the death of its chief projector. Plain, almost severe, in outline, with little pretense of ornamentation, the building both as to its exterior and interior presents an appearance of dignity and comfort and, aside from its historic associations, is a pleasing example of colonial architecture which any community might be proud to possess.

On taking leave of the Assembly in 1739 when owing to his increasing infirmities he decided to retire from public life he delivered the following address which by resolution was inserted in the minutes of the house.²⁸

Gentlemen,—As the service of the country should be the only motive to induce any man to take upon him the country's trust, which none ought to assume who find themselves incapable of giving such a constant attendance as the nature of so great trust requires; and as you are witnesses of the frequent indispositions of body I have so long laboured under, particularly during the winter season (the usual time of doing business here) and being apprehensive that, by reason of my age and infirmities, which daily increase, I may be unable to discharge the duty expected from a member of assembly; I therefore hope that these considerations alone, were there no others, will appear to you sufficient to justify the determination I am come to, of declining the farther service of the province in a representative capacity.

"As to my conduct, it is not for me to condemn or commend it; those who have sat here from time to time during my standing,

²⁸ Votes of Assembly of Pennsylvania, vol. III, 349.

and particularly these several gentlemen present, who were members when I first came into the House (whom I now see with pleasure) have the right to judge of my behaviour, and will censure or approve of it as it has deserved. But, whatever that may have been, I know my own intentions, and that I ever had at heart the preservation of liberty, the love of which, as it first drew me to, so it constantly prevailed upon me to reside in, this province, tho' to the manifest prejudice of my fortune.

But (waiving all remarks of a private nature, which reflections of this kind might naturally, and justly lead me into) I would beg leave to observe to you, that it is not to the fertility of our soil, and the commodiousness of our rivers, that we ought chiefly to attribute the great progress this province has made, within so small a compass of years, in improvements, wealth, trade and navigation, and the extraordinary increase of people, who have been drawn hither from almost every country in Europe; a progress which much more ancient settlements on the main of America cannot at present boast of, no, it is principally and almost wholly owing to the excellency of our Constitution, under which we enjoy a greater share both of civil and religious liberty than any of our neighbors.

It is our great happiness that instead of triennial assemblies, a privilege which several other colonies have long endeavored to obtain, but in vain, ours are annual; and for that reason, as well as others, less liable to be practised upon, or corrupted, either with money or presents. We sit upon our own adjournments, when we please, and as long as we think necessary, and are not to be sent a packing, in the middle of a debate, and disabled from representing our just grievances to our gracious sovereign, if there should be occasion, which has often been the hard fate of assemblies in other places.²⁰

²⁰ Hamilton's statements regarding the superior political advantages of the inhabitants of Pennsylvania are not exaggerated. In Massachusetts and Pennsylvania (including Delaware) alone were there charter provisions for annual assemblies. In a few of the other

We have no officers but what are necessary; none but what earn their salaries, and those generally are either elected by the people, or appointed by their representatives.

Other provinces swarm with unnecessary officers, nominated by the governors, who often make it a main part of their care to support those officers (notwithstanding their oppressions). At all events, I hope it will ever be the wisdom of our assemblies to create no great offices or officers, nor indeed any officer at all, but what is really necessary for the service of the country, and to be sure to let the people, or their representatives, have at least, a share in their nomination or appointment. This will always be a good security against the mischievous influence of men holding places at the pleasure of the governor.

Our foreign trade and shipping are free from all imposts, except the small duties payable to his Majesty by the statute laws of Great Britain. The taxes which we pay for carrying on the public service is inconsiderable; for the sole power of raising and disposing of the public money for the support of government is lodged in the assembly, who appoint their own treasurer, and to them alone he is accountable. Other incidental taxes are assessed, collected and applied by persons annually chosen by the people themselves. Such is our happy state as to civil rights.

Nor are we less happy in the enjoyment of a perfect freedom as to religion. By many years' experience, we find that an equality among religious societies, without distinguishing any one sect with greater privileges than another, is the most effectual method to discourage hypocrisy, promote the practice of the moral virtues,

colonies there were triennial or septennial acts. New York was long in obtaining the favor of septennial assemblies. The laws of Pennsylvania alone permitted the assembly to sit on its own adjournments. As to the right of dissolution this belonged to the governor in every colony except Pennsylvania where it was disputed and finally abandoned. In many respects the powers exercised by the Pennsylvania Assembly seem to have been greater than in the neighboring crown colonies. The Provincial Governor, E. B. Greene, chapter VIII, *passim*.

and prevent the plagues and mischiefs that always attend religious squabbling.

This is our Constitution, and this Constitution was framed by the wisdom of Mr. Penn, the first proprietor and founder of the province, whose charter of privileges to the inhabitants of Pennsylvania will ever remain a monument of his benevolence to mankind and reflect more lasting honour on his descendants than the largest possessions. In the framing of this government, he reserved no powers to himself or his heirs to oppress the people; no authority but what is necessary for our protection, and to hinder us from falling into anarchy; and therefore (supposing we could persuade ourselves that all our obligations to our great law-giver, and his honourable descendants, were entirely cancelled, yet) our own interests should oblige us carefully to support the government on its present foundation, as the only means to secure to ourselves and our posterity the enjoyment of those privileges, and the blessings flowing from such a Constitution, under which we cannot fail of being happy, if the fault be not our own.

Yet I have observed, that in former assemblies there have been men who have acted in such a manner as if they utterly disregarded all those inestimable privileges, and (whether from private pique and personal dislike, or thro' mistake, I will not determine) have gone great lengths in risking our happiness, in the prosecution of such measures as did not at all square with the professions they frequently made of their love to our government.

When I reflect on the several struggles which many of us, now present, have had with those men, in order to rescue the Constitution out of their hands, which, thro' their mistakes (if they were mistakes) was often brought on the brink of destruction; I cannot help cautioning you, in the most earnest manner, against all personal animosity in public consultations, as a rock, which, if not avoided, the Constitution will at some time or other infallibly split upon.

But there is no room for applications of that kind at present. It is with delight I see this session of assembly end in a manner

very different from what was expected in the beginning of the year. The principal business has been carried on with so good an agreement among the members of the House, and so little difference in sentiments between our governor and the people, that it cannot but yield a sensible pleasure to all who wish well to this province.

As this, gentlemen, is likely to be the last time I may trouble you with anything in this place, I hope you will the more easily pardon the liberties I have taken; and that you will farther permit me here to acknowledge my obligations to that county, which has so often elected me for one of their representatives; and at the same time to assure you, that I shall always retain a grateful sense of the great confidence so long reposed in me, and the honor so frequently conferred upon me by many successive assemblies, in calling me to the chair of this honorable house.

Two years later he died at Bush Hill and was buried in the family graveyard on the estate, but upon the sale of the property his remains with those of his children were removed to Christ Church yard. The following obituary notice appeared in the *Pennsylvania Gazette* of August 6th, 1741, attributed to Benjamin Franklin himself, which if somewhat eulogistic must have had a substantial basis of truth as otherwise it would have sounded like irony to the readers who knew the man so well.

On the fourth instant, died Andrew Hamilton, Esq., and was next day interred at Bush Hill, his Country Seat. His Corpse was attended to the grave by a great number of his friends, deeply affected with their own but more with their Country's loss. He lived not without enemies; for, as he was himself open and honest, he took pains to unmask the hypocrite, and boldly censured the knave, without regard to station or profession. Such, therefore,

may exult in his death. He steadily maintained the Cause of liberty; and the laws made during the time he was Speaker of the Assembly, which was many years, will be a lasting monument of his affection to the people, and of his Concern for the welfare of this Province. He was no friend to power, as he had observed an ill-use had been frequently made of it in the Colonies; and therefore was seldom on good terms with the Governors. This prejudice, however, did not always determine his conduct towards them, for, when he saw they meant well, he was for supporting them honourably, and was indefatigable in endeavoring to remove the prejudice of others. He was long at the top of his profession here; and had he been as griping as he was knowing, he might have left a much greater fortune to his family than he has done. But he spent much more time in hearing and reconciling differences in private (to the loss of his fees) than he did in pleading cases at the bar. He was just when he sat as Judge, and though he was stern and severe in his manner, he was compassionate in his nature, and very slow to punish. He was a tender husband and a fond parent. But these are virtues which fools and knaves have sometimes, in common with the wise and honest. His free manner of treating religious subjects gave offence to many, who, if a man may judge from their actions, were not themselves much in earnest. He feared God, loved mercy, and did justice. If he could not subscribe to the Creed of any particular Church, it was not for want of considering them all, for he had read much on religious subjects. He went through a tedious sickness with uncommon cheerfulness, constancy and courage. Nothing of affected bravery or ostentation appeared; but such a composure and tranquillity of mind as results from the reflection of a life spent agreeably to the best of man's judgment. He preserved his understanding and his regard for his friends to the last moment. What was given as a rule by a poet, upon another occasion, may be justly applied to him upon this:

. . . "Servetur ad imum
Qualis ab incepto processerit, et sibi constet."

Hamilton's family long occupied the most prominent place in the social and political life of the province. No descendants of the name are now living but several well known families in England and America trace their descent in the female line to the distinguished lawyer. His eldest son, James, who resided at Bush Hill was twice lieutenant-governor of the province and twice acting governor, as president of the Council. His grandson William was the builder of the beautiful "Woodlands" mansion which is still standing in the cemetery of that name in West Philadelphia. Margaret, daughter of the lawyer, married William Allen, the chief-justice of whom mention has been previously made and the founder of Allentown. During the Revolution the Hamiltons were suspected of Tory inclinations and lost their political influence. The Allens openly espoused that cause and were among the proscribed royalists.

A critical examination of Hamilton's solid claims to professional eminence is difficult at this day. The records of the courts have suffered the vicissitudes of time and revolution. His appreciative biographer, Joshua Francis Fisher, states: "In America, we find traces of his employment in the courts of several colonies; and his opinion was often sought for by different provincial governors, in matters of political or pecuniary importance. At home he probably had a part in every important case. His great success excited envy and stimulated calumny.

The party leaders he opposed and frustrated, the rival lawyers whose ignorance and incompetence he exposed, the unfortunate litigants whom he disappointed, all were his enemies, or at least, ready to listen to his detractors. There exist in print some most abusive attacks upon him, the scurrility of which is alone fatal to their credit—which contain no definite charges, and which are contradicted by all we know of him.³⁰ The chief accusation was a grasping spirit and dishonesty in his practice. The latter charge is impossible, for he had the respect of all the best men of the colony. * * * To this may be added the recollections of the writer * * * that there were found at the Woodlands, when that family seat was broken up, many boxes and trunks full of legal papers, including briefs and opinions evincing great learning and labor, and indicating extensive practice throughout the middle colonies. Much that was interesting and valuable might have been rescued; but the writer was at that time too young to estimate their worth, and they were left to the ordinary fate of worm-eaten family papers. Among the books which had been inherited by Mr. William Hamilton, were a few with the name of

³⁰ See the curious pamphlet entitled, "A True State of the case of R. R. Widow," reprinted in the appendix to III Statutes at Large of Pennsylvania, p. 479, and relating to some prolonged litigation over a house and lot on Chestnut street, Philadelphia. The proceedings included an equity suit, Richardson vs. Hamilton, Attorney General, cited by Lord Chancellor Hardwicke in Penn vs. Lord Baltimore (1 Vesey Senior's Reports, 444) as a precedent for the doctrine that equity acts in personam.

his grandfather in various departments of literature, some of them with annotations in English and Latin, indicative of deep and curious learning." The public documents from his pen are ably written; his conduct of the Maryland negotiations shows firmness and good judgment. However employed, he appears always resourceful, aggressive and masterful.

It was Andrew Hamilton's fortune to figure in a case of real historical importance as well as cotemporary interest, rendered so largely by the daring originality of his argument and the ability and power with which it was expressed. The defense of Zenger the printer was his greatest professional achievement. As a political case the outcome was a distinct triumph for the popular party in a crown colony; it was so considered both in England and America and gratefully recognized as such by the corporation of the city of New York. But many political cases have faded from memory with the extinction of the animosities they fostered or created. The true significance of the trial lies in its relation to the history of journalism. It was a protest that aroused sympathy and crystallized public sentiment, with far reaching consequences in the not distant future. If pedantic cotemporaries looked upon the champion of an ill treated profession as a dangerous innovator, time has sustained his contentions, and the press, the mightiest of modern institutions, ought not to be forgetful of his services generously rendered in an hour of need.

The incidents leading up to the trial form an interesting chapter in the history of New York.³¹ Upon the death of Governor Montgomerie in 1731, Rip VanDam, a prominent merchant and leader of the popular party, as senior member of the Council, became its president and claimed the full salary as governor which the Council after five months' deliberation allowed. In 1732 William Cosby, a brother-in-law of the Earl of Halifax and connected with Newcastle, the Prime Minister, "a boisterous, irritable man having little understanding and no sense of decorum," was sent over to mend his broken fortunes as governor. One of his first acts after his arrival was to call upon Rip VanDam to restore to the treasury a moiety of the full salary he had received, it was alleged, in contravention of the royal instructions and on the refusal of the president to comply, the Attorney-General was directed to begin an action to enforce the order.

At the trial, Lewis Morris,³² the chief-justice of the Supreme Court, surprised the governor and the whole aristocratic party by denying the jurisdiction of the court to determine the question, and in general the right of the crown to establish courts of equity without legislative sanction. Cosby then removed

³¹ Windsor's Narrative and Critical History of America, vol. V, 198; Stone's History of New York City, p. 133; Documents relating to Colonial History of New York, vol. VI, 4 *et seq.*; Lamb's History of New York City, vol. I, 548 *et seq.*

³² Afterwards Governor of New Jersey, grandfather of Gouverneur Morris.

Morris and put James DeLancey, the second judge, in his place. He also excluded VanDam from the Council as well as James Alexander and William Smith, prominent lawyers³³ who had planned for New York the system of annual grants for support.

At this time the only newspaper in New York was the *Gazette* edited by William Bradford and patronized by the government. John Peter Zenger, a German, one of the Palatines sent out by the English government,³⁴ who had learned printing with William Bradford, was induced by the popular leaders in 1733 to start a new paper, "The New York Weekly Journal, containing the freshest advices foreign and domestic." In the columns of this paper, the acts of the Governor and his party were criticised with great severity and not a little literary skill.

The official party were not long in retaliating. A few months after the paper was founded, the Chief-Justice called the attention of the grand jury to the matter and again in October, 1734, charged them at

³³ James Alexander is stated by Fiske to have been a Scotch Jacobite who had found the old country too hot for him after the rebellion of 1715. His son, William Alexander, was the revolutionary general commonly known as "Lord Stirling." *Dutch and Quaker Colonies*, vol. II, p. 249. William Smith was the father of the historian of early New York.

³⁴ A large number of the oppressed inhabitants of the Palatinate who had fled to England were sent to New York by the English government, among them the parents of Zenger. The father having died, John Peter Zenger, then thirteen years of age, was in 1710 apprenticed by Governor Hunter to William Bradford, printer. The indenture is printed in a note to "The Story of the Palatines" by Sanford H. Cobb, p. 308.

length on the subject of libels. The grand jury failing to act, the Council requested the General Assembly to join with them in an order for the prosecution of Zenger and that certain numbers of the journal should be burnt by the common hangman. This the Assembly declined to do, whereupon the Council ordered the burning of the offensive publications and directed the mayor and magistrates of New York City to attend the burning. Upon reading this order at the Quarter Sessions the Court declared the order illegal and forbade the members of the corporation to pay any attention to it, even declining the request of the sheriff that their "whipper" execute the order, so that the sheriff was obliged to employ "his own negro" to put the objectionable documents into the fire.

On November 17th, 1734, Zenger was arrested on a warrant issued by the Council and lodged in jail where he was denied for several days the use of pen, ink and paper. A habeas corpus was sued out, but the bail required by the Chief-Justice was beyond the prisoner's power to obtain. In the following January the grand jury having again refused to indict, an information was filed by the attorney-general, Richard Bradley, charging him with printing and publishing certain false, scandalous and seditious libels in the *Weekly Journal*. The two most prominent lawyers connected with the popular party, James Alexander and William Smith, had been retained for Zenger, and as they were the re-

puted authors of some of the most vigorous articles in Zenger's paper they warmly espoused his cause. In April, 1735, exceptions were filed to the commissions of the judges principally because they were appointed to serve during the king's "pleasure" and not so long as they "behaved themselves well." This was one of the political grievances and its introduction into the case gave great offense to the judges. The Court promptly rejected the exceptions and disbarred Alexander and Smith for contempt of court. Zenger petitioned for other counsel and the Court appointed a Mr. Chambers to defend him, but his friends, members of a political society called the "Sons of Liberty," evidently fearing the influence of the government, obtained the additional services of Hamilton.

The case came on to be tried before Chief-Justice DeLancey and Justice Phillipse on August 4th, 1735, in the City Hall on Wall street afterwards the scene of Washington's first inauguration as President of the United States. The prosecution of Zenger had increased the general discontent with the Governor and Council and popular sympathy was strongly on the side of the prisoner, whose friends successfully prevented an attempt to pack the jury. The article upon which the prosecution chiefly relied to obtain a conviction was a letter from a correspondent purporting to relate a conversation with certain New Yorkers who were removing to Pennsylvania. "I think," said one, "the law itself is at an end. We

see men's deeds destroyed,³⁵ judges arbitrarily displaced, new courts erected, without consent of the legislature, by which it seems to me, trials by juries are taken away when the governor pleases, men of known estates denied their votes, contrary to the received practice, the best expositor of any law. Who is then in that province that (can) call anything his own, or enjoy any liberty longer than those in the administration will condescend to let them do it, for which reason I have left it as I believe more will."³⁶

To those accustomed to the practically unlimited freedom of political discussion allowed to-day it may appear surprising that generalities such as the above should have formed the basis of a criminal prosecution. In this connection it may be interesting to refer briefly to the state of the law on the subject of seditious libels as laid down in Hamilton's time. The invention of printing and the intellectual movement that followed gave to political writings an importance which they did not formerly possess. Simultaneously the Court of Star Chamber obtained jurisdiction of such cases and deciding both the law and the fact, dealt with the unfortunate offenders with great severity. This severity was not mitigated with the abolition of that court and under the later Stuarts and, indeed, for many years after the revolu-

³⁵ It was asserted by cotemporaries that Cosby had destroyed Indian deeds that he might profit by certain land speculations.

³⁶ The letter is printed in full in *New Jersey Archives*, 1st Series, t vol. XI, 360.

tion of 1688 the law as to seditious offenses received little addition or development. A seditious libel in the eighteenth century according to Mr. Justice Stephen was "a written censure upon public men for their conduct as such, or upon the laws or upon the institutions of the country."³⁷ In the words of Lord Chief-Justice Holt, "If people should not be called to account for possessing the people with an ill opinion of the government no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it."³⁸ The crime, then, consisted in publishing a defamatory writing and the good or bad intention of the writer, or the truth or falsity of his statements were immaterial. It had frequently been determined in the King's Bench that the only questions for the consideration of the jury were the fact of publication and the truth of the innuendoes, that is, that the words of the libel were actually used in the sense complained of in the indictment or information, the libellous character of the writing being a question of law for the court.³⁹ Counsel on more than one occasion contended for a less stringent rule, for it is plain that so long as this doctrine was recognized, the public discussion of political affairs existed only on sufferance. As a matter of fact the law and common practice had come into direct contradiction.

³⁷ Stephen's *History of the Criminal Law of England*, vol. II, 348.

³⁸ *Tuchin's Case*, 14 Howell's *State Trials*, p. 1095, at page 1128.

³⁹ *Blackstone Commentaries*, Lewis's Edition, IV, 151, and notes.

"I think," says Stephen, "that the rhetoric commonly used about the liberty of the press derived some part of its energy and vivacity, from the consciousness which the lawyers who employed it must have had of the insecurity of its legal foundation—a circumstance which exercised influence in more ways than one over much of the inordinate appetite for rhetoric which was characteristic of the eighteenth century."⁴⁰

In the colonies the right of free speech if claimed in theory by advanced thinkers was, in fact, restricted by legislation vaguely directed against "seditious utterances," a conveniently indefinite expression and the source of numerous petty prosecutions.⁴¹ In Pennsylvania, Penn, with all his liberality, had incorporated in the "Great Law" of 1682 a strong provision against seditious writings⁴² and in several instances printers had been admonished by the Council. In 1692 William Bradford before his removal to New York had been indicted for printing a seditious pamphlet, attributed to George Keith, containing a denunciation of the Quaker justices who had issued a warrant for the forcible apprehension of a pirate. At this trial in the Quarter Sessions,⁴³ Bradford contended that the jury should find whether the paper was seditious and although David

⁴⁰ Stephen's *History of the Criminal Law of England*, vol. II, 349.

⁴¹ *The Provincial Governor*, E. B. Greene, p. 198.

⁴² *Charter and Laws of Pennsylvania*, pp. 114, 115.

⁴³ *Pennypacker's Colonial Cases*, p. 135.

Lloyd, the attorney for the Proprietor, contended that this was a matter of law for the court, the judge, Samuel Jennings, instructed the jury to find whether the paper tended to weaken the hands of the magistrate, whether it tended to disturb the peace and whether Bradford printed it. The jury disagreed, strange to say, on the question of publication and this curious case went no further. "*Comme la vérité, l'erreur a ses héros.*"

A more celebrated case was the trial of Colonel Nicholas Bayard in New York in 1702. Under a statute declaring that persons endeavoring to disturb the peace, good and quiet of their majesties' government as established should be deemed rebels, Colonel Bayard was arrested on a warrant of Lieutenant-Governor Nanfan and the Council, his political enemies, and committed on a charge of high treason. A special commission of oyer and terminer was issued to William Atwood, chief-justice, and Abraham De-Peyster and Robert Walters puisne justices of the Supreme Court to try him. By manipulation of the grand jury an indictment was found charging the prisoner with circulating among the citizens and soldiers of the garrison libels against the government. These alleged libels were addresses or petitions to the King, Parliament and to the newly appointed Governor Lord Cornbury. They were not in evidence, but one of the witnesses testified that they asserted that in Lord Bellamont's administration "the hottest and ignorantest of the people were put in places of trust"

and that an illegally organized Assembly had appropriated money to the Governor to obtain his connivance with their acts. After a trial farcical in the extreme, in the course of which Chief-Justice Atwood declared that it might be a crime to petition the House of Commons from the plantations where the King governed by prerogative, a verdict of guilty was forced from a reluctant jury and Colonel Bayard sentenced to be hanged, drawn and quartered. The sentence, however, was not carried out, Lord Cornbury on his arrival obtaining an act reversing the attainder, which was approved by Queen Anne.⁴⁴ Is it any wonder that men lost confidence in the courts that stooped to become the instruments of political oppression?

Hamilton, then, while he knew that the law was against him, knew also that there was a strong undercurrent of resentment against the rules of law that, for the crime of libel alone, reduced the functions of the jury to a nullity, and took advantage of this resentment with all the audacity, wit and eloquence at his command. It is unnecessary to recite the proceedings at length as they are reported in several cotemporary pamphlets as well as in the 17th volume of Howell's *State Trials*,⁴⁵ a dull tome where the case sparkles like a diamond in a dust heap. When the Attorney-General had read the information

⁴⁴ See the report of the case Howell's *State Trials*, vol. XIV, 471, and Smith's *History of New York*, p. 147.

⁴⁵ Page 675.

Hamilton candidly admitted the publication and offered to prove the truth of the statements, contending that the articles were justifiable if true in fact.

While men keep within the bounds of truth, I hope they may with safety both speak and write their sentiments of the conduct of men in power, I mean of that part of their conduct only, which affects the liberty or property of the people under their administration; were this to be denied, then the next step may make them slaves. For what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions, without the liberty of complaining; or if they do, to be destroyed, body and estate, for so doing.

I will go so far into Mr. Attorney's doctrine as to agree, that if the faults, mistakes, nay, even the vices, of such a person be private and personal, and don't affect the peace of the public, or the liberty or property of our neighbour, it is unmanly and unmannerly to expose them, either by word or writing. But when a ruler of the people brings his personal failings, but much more his vices, into his administration, and the people find themselves affected by them, either in their liberties or properties, that will alter the case mightily; and all the high things that are said in favor of rulers, and of dignities, and upon the side of power, will not be able to stop people's mouths when they feel themselves oppressed, I mean in a free government. It is true, in times past, it was a crime to speak truth; and in that terrible court of Star-chamber, many worthy and brave men suffered for so doing; and yet, even in that court, and in those bad times, a great and good man durst say, what I hope will not be taken amiss of me to say in this place, to wit, 'The practice of informations for libels is a sword in the hands of a wicked king, and an arrant coward, to cut down and destroy the innocent; the one cannot because of his high station, and the other dares not, because of his want of courage, revenge himself in another manner.'

Attorney General. "Pray, Mr. Hamilton, have a care what

you say; don't go too far neither: I don't like those liberties."

Mr. Hamilton. "Sure, Mr. Attorney, you won't make any applications: All men agree, that we are governed by the best of kings; and I cannot see the meaning of Mr. Attorney's caution: My well known principles, and the sense I have of the blessings we enjoy under his present majesty, make it impossible for me to err, and, I hope, even to be suspected, in that point of duty to my king.

In his argument he brought to bear every shred of authority or dicta to be found in the books, cleverly disparaging the Star Chamber cases and emphasizing the trial of the Seven Bishops.⁴⁶

It had already been shewn, how the judges differed in their opinions about the nature of a libel, in the case of the Seven Bishops. There you see three judges of one opinion, that is, of a wrong opinion, in the judgment of the best men of England, and one judge of a right opinion. How unhappy might it have been for all of us at this day, if that jury had understood the words in that information as the Court did? Or if they had left it to the Court to judge, whether the Petition of the Bishops was or was not a libel? No! they took upon them, to their immortal honour, to determine both law and fact, and to understand the Petition of the Bishops to be no libel, that is, to contain no falsehood nor sedition, and therefore found them Not Guilty.

One phase of his argument indicates his Pennsylvania training and may have startled his listeners. "What strange doctrine is it to press everything for law here which is so in England? I believe we should not think it a favour, at present at least, to establish this practice."

⁴⁶ Howell's State Trials, vol. XII, 183.

The court having refused to permit him to prove the facts, Hamilton then turned to the jury and appealed to them as witnesses to the truth of the facts he had offered. The law he said supposed them to be summoned out of the neighborhood because of their knowledge of the facts. He then drew from the Attorney-General his definition of a libel and continuing his argument insisted although this was vigorously denied by the court, that the jury had the right to determine both the law and the fact. He then reviewed the great constitutional battles of the Seventeenth Century and applied their results to the situation in New York, cleverly touching on several sore points that must have stung some of his auditors and filled others with unfeigned joy.

If a libel was understood in the unlimited sense urged by the Attorney-General, he said, scarce any person would be safe from being called to account as a libeller.

I sincerely believe, that were some persons to go through the streets of New York, now-a-days, and read a part of the Bible, if it was not known to be such, Mr. Attorney, with the help of his innuendos, would easily turn it into a libel. As for instance, Is. xi. 16. 'The leaders of the people cause them to err, and they that are led by them are destroyed.' But should Mr. Attorney go about to make this a libel, he would read it thus: "The leaders of the people" (innuendo, the governor and council of New York) "cause them" (innuendo, the people of this province) "to err and they" (the governor and council meeting) "are destroyed" (innuendo, are deceived into the loss of their liberty); "which is the worst kind of destruction. Or if some person

should publicly repeat, in a manner not pleasing to his betters, the 10th and 11th verses of the 56th chap. of the same book, there Mr. Attorney would have a large field to display his skill, in the artful application of his innuendos. The words are: 'His watchmen are blind, they are ignorant,' &c. Yea, they are 'greedy dogs, that can never have enough.' But to make them a libel, there is, according to Mr. Attorney's doctrine, no more wanting but the aid of his skill, in the right adapting his innuendos. As for instance: 'His watchmen' (innuendo, the governor's council and assembly) 'are blind, they are ignorant' (innuendo, will not see the dangerous designs of his excellency). 'Yea, they' (the governor and council meaning) 'are greedy dogs, which can never have enough' (innuendo, enough of riches and power). Such an instance as this seems only fit to be laughed at; but I may appeal to Mr. Attorney himself, whether these are not at least equally proper to be applied to his excellency, and his ministers, as some of the inferences and innuendos in his information against my client.

The peroration is a fine example of forensic eloquence.

Power may justly be compared to a great river; while kept within its due bounds, it is both beautiful and useful; but when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which, in all ages, has sacrificed to its wild lust, and boundless ambition, the blood of the best men that ever lived.

"I hope to be pardoned, Sir, for my zeal upon this occasion: it is an old and wise caution, 'That when our neighbour's house is on fire, we ought to take care of our own.' For though, blessed be God, I live in a government where liberty is well understood, and

freely enjoyed; yet experience has shewn us all (I'm sure it has to me), that a bad precedent in one government, is soon set up for an authority in another; and therefore I cannot but think it mine, and every honest man's duty, that (while we pay all due obedience to men in authority) we ought at the same time to be upon our guard against power, wherever we apprehend that it may affect ourselves or our fellow-subjects.

I am truly very unequal to such an undertaking, on many accounts. And you see I labour under the weight of many years, and am borne down with great infirmities of body; yet old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land, where my service could be of any use, in assisting to quench the flame of prosecutions upon informations, set on foot by the government, to deprive a people of the right of remonstrating (and complaining too) of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppressions and prosecutions. I wish I could say there were no instances of this kind. But to conclude; the question before the Court, and you, gentlemen of the jury, is not of small nor private concern; it is not the cause of a poor printer, nor of New York alone, which you are now trying: No! It may, in its consequence, affect every freeman that lives under a British government on the main of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens; but every man, who prefers freedom to a life of slavery, will bless and honour you, as men who have baffled the attempt of tyranny; and, by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbours, that to which nature and the laws of our country have given us a right — the liberty — both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth.

The jury retired and in a short time brought in a verdict of "not guilty," "upon which," states the triumphant Zenger, "there were three huzzas in the hall, which was crowded with people; and the next day I was discharged from my imprisonment."

The verdict was highly popular and Hamilton the hero of the hour, was carried in triumph to a public banquet given in his honor and when it was time for him to return to Philadelphia was escorted to his sloop with drums and trumpets.⁴⁷ The Corporation of the City of New York conferred upon him their public thanks and the freedom of the city as a mark of gratitude for his services to the inhabitants of the city and colony by his "learned and generous defense of the rights of mankind and the liberty of the press" in the case of John Peter Zenger "which he cheerfully undertook under great indisposition, and generously performed, refusing any fee or reward." At the same time it is recorded that "sundry members of the corporation and gentlemen of the city voluntarily contributed sufficient for a gold box of five ounces and a half for enclosing the seal of the said freedom." Around the lid of the box was engraved the arms of the City of New York and the motto "*Demersae Leges—timefacta Libertas—haec tandem emergunt.*" On the inner side of the lid "*Non nummis, Virtute paratur*" and on the front of the rim "a part of Tully's wish; *Ita cuique*

⁴⁷ Dutch and Quaker Colonies in America, Fiske, vol. II, 257. Lamb's History of the City of New York, vol. I, 556.

eveniat, ut de republica meruit." The diploma and gold box were graciously received by Mr. Hamilton and preserved as a family heirloom by his descendants.

The outcome was mortifying to the Court and the Governor's party, the bitterness surviving Cosby's death, when his temporary successor was only deterred from sending VanDam, Smith and Zenger to England to be tried for treason by the fact that the royal instructions required proof positive of the crime in such cases.⁴⁸ The result, however, was ultimately beneficial to the community as it led to more moderate conduct on the part of the official class and a better definition of the jurisdiction of the courts.

The case, it is said, "made a great noise in the world." It was printed in New York, Boston and London. More than one letter was published scathingly criticising the argument, the author of which, says Stephen, "would have found it difficult to defend himself on his own principles if he had been tried for a libel on Hamilton."

The Pennsylvania Gazette of May 11th, 1738, con-

⁴⁸ "If James Alexander, William Smith and Lewis Morris, Jr., the author of the seditious papers with John Peter Zenger, their printer, were sent to England, the spirit of faction would be entirely broke, but this at present I dare not venture to do without orders, being by his majesties 45th instruction forbid to send any prisoners to England without sufficient proof of their crimes to be transmitted with them." President Clarke to the Duke of Newcastle, October 7, 1736. "Documents relating to Colonial History of New York," vol. VI, 76.

tains the following letter from its London correspondents:

We have been lately amused with Zenger's trial which has become the common topic of conversation in all the Coffee Houses, both at the Court End of the Town and in the City. The greatest men at the Bar have openly declared that the subject of Libels was never so well treated in Westminster Hall, as at New York. Our political writers of different factions, who never agreed in anything else, have mentioned the trial in their public writings with an air of Rapture and Triumph. A Goliath in learning and politics gave his opinion of Mr. Hamilton's argument in these terms, 'If it is not law it is better than law, it ought to be law and will always be law wherever justice prevails.' The trial has been reprinted four times in three months, and there has been a greater demand for it, by all ranks and degrees of people than there has been known for any of the most celebrated performances of our greatest Geniuses. We look upon Zenger's advocate as a glorious asserter of public liberty and of the rights and privileges of Britons."

In spite of this encomium it is improbable that the "great courts" at Westminster regarded the case as anything more than an example of colonial effervescence, certainly not, if the reception of Erskine's celebrated argument fifty years later in the Dean of St. Asaph's case is any criterion. Speaking of that argument Erskine said of Lord Mansfield: "He treated me not with contempt indeed, for of that his nature was incapable, but he put me aside with indulgence, as you do a child when it is lisping its prattle out of season."⁴⁹

⁴⁹ Paine's Case, 22 Howell's State Trials, vol. XXII, 357, at page 471.

The speech of Zenger's counsel, says Stephen, "was singularly able, bold and powerful, though full of doubtful, not to say bad law."⁵⁰ And Horace Binney has remarked:⁵¹ .

He merely claimed to liberate the jury from the authority of some disagreeable law and of an obnoxious court holding its appointment from the crown. No lawyer can read that argument without perceiving, that, while it was a spirited and vigorous, though rather overbearing harangue which carried the jury away from the instruction of the court, and from the established law of both the colony and the mother country, he argued elaborately what was not law anywhere with the same confidence as he did the better points of his case. It is, however, worth remembering, and to his honour, that he was half a century before Mr. Erskine, and the declaratory act of Mr. Fox, in asserting the right of a jury to give a general verdict in libel as much as in murder, and in spite of the court, the jury believed him and acquitted his client."

The view of Judge Cadwalader is more appreciative.⁵²

Reform, through legislation, may be effected with little difficulty as compared with administrative reformation of jurisprudence without legislative aid. The Advocate who can effect the latter, especially where political considerations are involved, must be a mental giant. One great excellence of the system of trial by jury is, that it affords the means of gradually producing such reformations without revolutionary perils. Propositions in this argument, which were, strictly speaking, untenable as points of Anglo-American Colonial law, prevailed, nevertheless, at that day,

⁵⁰ Stephen's History of the Criminal Law of England, p. 323, note.

⁵¹ Leaders of the Old Bar of Philadelphia, Pennsylvania Magazine, vol. XIV, 7.

⁵² Pennsylvania Magazine, vol. XVI, 18.

with the jury. These propositions have been since engrafted permanently upon the political jurisprudence of this Continent. If that speech to the jurors who acquitted Zenger had never been uttered, or had not been reported, the framers of the Constitutions of the several States might not have been prepared for the adoption of provisions like that of the Seventh Section of the Declaration of Rights in Pennsylvania.⁵³

In the trial of this case Hamilton displayed traits of character that have come to be regarded as typically American, such as a sense of humor, keen,

⁵³ The reference is to Article I, Section 7, of the Constitution of Pennsylvania which provides: "The printing press shall be free to every person who may undertake to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases." This provision, in most of its features, first appeared in the Constitution of 1790, two years before the English statute of 32 George III, c. 60, better known as Fox's libel act, was passed. Similar clauses will be found in the constitutions of most of the States. It is unnecessary to consider the present state of the law of libel, which is fully treated in the text-books, except to remark that in determining "the law and the fact," the jury are not constituted judges of the law. "They are bound to take the law from the court; but so taking it, they have the right to apply it to the facts as they may find them to be proved, and to announce the result of the whole, by a general verdict of guilty or not guilty." Per Mitchell, J., in a concurring opinion of *Comm. vs. McManus*, 143 Pennsylvania Reports, 64, where the subject is learnedly discussed and the authorities cited.

cynical and, as some of his cotemporaries thought, perhaps irreverent; an indifference to matters of form and an abiding common sense. Even more striking is the daring confidence and aggressive candor with which he insisted on the finality of his viewpoint, qualities that American lawyers and statesmen have revealed in international discussions, to the discomfort of old world diplomacy.

"Quand tout le monde a tort, tout le monde a raison." Hamilton voiced the demands of the community and in due time the community, as it generally does, obtained what it insistently demanded. An all pervading press chides and castigates the official, who under modern conditions no longer rules as lord and master, but obeys, or pretends to obey, as the humble servant of democracy. Some of the castigated may feel that Lord Mansfield's warning has been neglected and "Pandora's box, the source of every evil"⁵⁴ has been opened. Vulgarity, unnecessary invasions of privacy, and hysteria may offend the sensitive, but the world-stage is not for the thin-skinned when the audience clamors for sensations, and if, as LaRochefoucauld would have it believed, it is human to view with equanimity the misfortunes of one's friends, how much more human is it to rejoice when they are pilloried in the press. Little sympathy is wasted on the prosecutor in an action for criminal libel.

A philosopher conversant with the mutations of

⁵⁴ King vs. Shipley, 3 Douglas's Reports, 170.

time might speculate upon the improbability of the permanence of present conditions. The extension of true culture and refinement should naturally result in the elimination of that craving for notoriety whether pleasant or unpleasant which tends to popularize personal journalism, that illiterate and grotesque curiosity which feeds on sham sensations and distorted trivialities. Credulity too has its limits, the brazen advertiser of his own virtues may hear the chorus of his praises drowned in immoderate laughter, the public may ultimately refuse to believe what it knows to be probably false.

The Japanese have shown that in time of war the suppression of news is part of the high art of military strategy. Under similar conditions would the Anglo-Saxon grudgingly submit to be severed from the companion of his breakfast table, and learn to consume a chop without devouring the news?

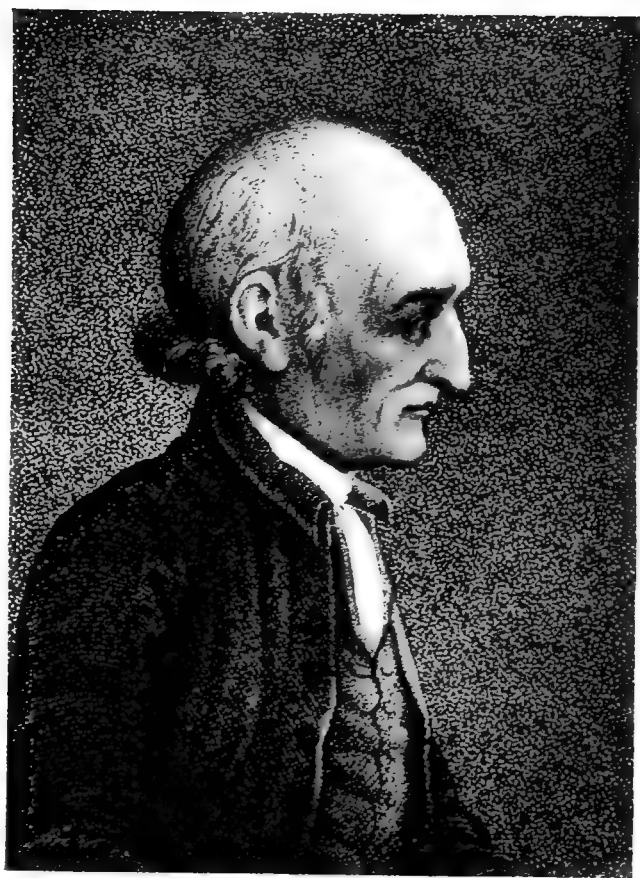
What too, it may be inquired, would be the fate of a free and irresponsible press under the benign and paternal state socialism so confidently predicted for the future? Would the superior brethren permit the weaker members of society to be contaminated by individualistic heresy?

"Tarda sit illa dies, et nostro senior aevo." Such speculations belong to the land of dreams. This generation lives in the dazzling sunlight of publicity and finds it not altogether unwholesome,—let it bow its acknowledgments to the bold advocate who first blazed a path through the forest.

GEORGE WYTHE.

GEORGE WYTHE

From an engraving in the Virginia State Library at Richmond, Virginia. The source of the engraving and name of artist are unknown.



GEORGE WYTHER.

1726-1806.

BY

LYON GARDINER TYLER,

President of the College of William and Mary.

GEORGE WYTHER was descended from an honorable line of ancestors, who had held for generations leading positions in the county of Elizabeth City, in the colony of Virginia. Thomas Wythe, his great grandfather, came to Virginia about 1680, and was a magistrate of Elizabeth City County for many years. He died in 1694, leaving a son of the same name, who was born in 1670, married Ann Sheppard, the widow of Quintilian Guthericke, one of the first trustees of Hampton, and died a few months after his father in 1694, leaving issue two small children, Thomas and Ann. Thomas, who was the third in descent and father of George Wythe, was born about 1691, and lived to be a man of importance in the colony. He was repeatedly elected to the House of Burgesses, and served as a member at the sessions beginning in 1720, 1723, and 1726. He married in 1720 Margaret Walker, a lady of good education for the times in which she lived.¹ She

¹ Elizabeth City County Records.

was the daughter of George Walker, of Elizabeth City County, and Ann Keith, daughter of George Keith, a celebrated preacher and scholar from whom George Wythe inherited his Christian name and probably much of his talent.

Keith was born at Aberdeen, Scotland, in the year 1638, and was educated at the University in his native city. He was originally connected with the Kirk of Scotland, but soon after taking the degree of Master of Arts he joined the Quakers, and for thirty years was one of their most eminent champions in England and America. He had extraordinary native talent to which he added an extensive knowledge of mathematics and the ancient languages. In 1682 he came to East New Jersey, and in 1689 he he removed to Philadelphia. In 1694 he broke with William Penn and the Quakers, and in 1700 joined the Church of England. Having preached in various places in England, he returned to America, in 1702, as the first missionary to America of the "Society for Propagating the Gospel in Foreign Parts," of the English Church.

He travelled and preached in all the governments belonging to the Crown of England, between Piscataqua river and North Carolina, making thousands of converts to the English church and winning high reputation by his talents as a speaker and controversialist.² Anne, his daughter, married, as stated,

² Sketch of George Keith, in Sprague, *Annals of the American Church*, pp. 25-30.

George Walker, of Elizabeth City County, gunner and storekeeper of the fort at Point Comfort in 1723. He was a Quaker, and when George Keith abjured the faith of the sect, religious differences arose between Walker and his wife, whose admiration for her father made her a willing follower in his ways. Keith in his diary tells of spending ten days at the home of George Walker by James river and says of his daughter: "She is fully come off from the Quakers and is a zealous member of the Church of England, and brings up her children, so many of them as are capable through age, in the Christian religion; praise be to God for it." Walker, it appears, did not like the action of his wife and tried to restrain her and her children from attending the parish church, and Ann, who possessed the spirit of her father, appealed, in 1708, to the governor and council, who entered an order that George Walker should not prevent her from enjoying the free exercise of her religion.³ These differences gradually wore away and twenty years later Samuel Bownas, a Quaker preacher, related that on the invitation of George Walker, he spent four nights at Walker's home on the "Strawberry banks," and found Mrs. Walker "more loving" than he had expected. "She was George Keith's daughter," he writes, "and in her younger days showed great dissatisfaction with Friends, but after her father's death the edge of that bitterness abated, and her husband was very loving

³ William and Mary College Quarterly, vol. IX, 127.

and hearty to Friends, frequently having meetings at his house."

Their daughter, Margaret, in 1719, married, as stated, Thomas Wythe, who died in 1729, leaving three little children—Thomas, George, and Ann.⁴ Thomas lived to be a man and a representative in the Assembly, and died, without children, in 1755. Ann married Charles Sweeney, and her grandson George Wythe Sweeney, as will be seen, has a melancholy connection with her eminent brother George Wythe's death. George, the second son, was born at the house of his father on Back river, in Elizabeth City County, in 1726, and the building, a brick structure of medium size, is still standing. The elder brother being the heir-at-law, it is said that their mother's moderate circumstances induced her to undertake George's education herself. She taught him the Latin grammar and to read the Colloquies of Corderius, and also aided him in the rudiments of Greek, for although she did not understand the language herself, yet she knew the alphabet and assisted him in the translation by holding the dictionary and enabling him the more readily to compare the English with the Greek version of the Testament.

After a few years his mother also died; and with the limited scholastic education acquired under her guidance he was present a short time at the college of William and Mary, probably in the grammar

⁴ Will of Thomas Wythe in Elizabeth City County Records.

school, and then was sent to Prince George County to study law under Stephen Dewey, an eminent lawyer, who married his aunt, Elizabeth Walker.⁵ Mr. Dewey confined him to the drudgery of his office, with little or no attention to his instruction in the general science of law, and in fact treated him, as Wythe said in after years, with "neglect." Very probably, however, the labors to which Wythe was subjected at this time were not without influence upon his future success. The profession of the law demands practice as well as knowledge, and it is only by drudgery that the exactness, accuracy, and closeness of thought so necessary for a good lawyer are engendered. And no doubt Wythe profited by his experience under Mr. Dewey far more than he supposed, and probably the very drudgery complained of was an important factor in enabling him, after ten years of comparative idleness, to secure for himself so high a position before the public.

He entered upon the practice of law and qualified in the court of Elizabeth City County, June 18, 1746, at the age of 20 years, but removed soon after to Spottsylvania County, where he became associated with John Lewis, an eminent lawyer in that part of the Colony, and in December, 1747, married his sister, Ann Lewis, who lived only till August, 1748. Wythe continued to live in Spottsylvania some eight years after his wife's death, and we are told that he became addicted to "the amusements and dissipa-

⁵ Elizabeth City County Records.

tions of society," but certain facts seem to indicate that the foibles of his youth have been greatly exaggerated. When the General Assembly, in the early part of 1754, sent Peyton Randolph, the attorney general, to England to protest against the fee of a pistole imposed by Governor Dinwiddie upon land grants, the latter selected Wythe to hold the office of attorney general during Randolph's absence. Then in the latter part of the year, when the General Assembly raised twenty thousand pounds to repel the French, Wythe had the honor of being appointed a member of the committee charged with the important duty of coöperating with the governor in expending the money. These facts show that Mr. Wythe, when only twenty-eight years of age, was highly esteemed and well known, and really could not have been far gone in dissipation. Probably the most that can be said is that Mr. Wythe, during this period, spent some of his time in the ordinary amusements of the day, horse-racing, fox-hunting, dancing and cock-fighting—diversions in which Washington also took part, and not necessarily destructive of morals or principles.

Be that as it may, his conduct at the age of thirty underwent a change, which may have been due to the death of his elder brother in 1755, devolving upon him a large estate. Mr. Wythe returned to lower Virginia, took leave forever of all the frivolities of youth, and opening his office in Williamsburg, applied himself, unassisted by any tutor, vigorously to

the study of law, of the dead languages, and of the liberal sciences. He was admitted to the bar of the General Court, and, with the incoming of Francis Fauquier, as governor, his brilliant career made its true beginning. He became the fast friend of that popular and accomplished gentleman; and the display of his talents in society and the courts caused him to be honored, in 1758, by the faculty of William and Mary College with an election as the representative of that corporation in the House of Burgesses. As his predecessors in this capacity had been the most eminent lawyers in the colony—Edward Barradall, Beverley Randolph, and Peyton Randolph, afterwards first president of the Continental Congress—this election itself was proof of the eminence to which he had already attained, and suggestive of the still greater success which the future had in store for him. His subsequent career was eminent along many lines, but in three aspects, at least—as statesman, as teacher, and as jurist—he had few equals in the galaxy of great men that adorn the annals of Virginia. Probably the best idea that can be obtained of Mr. Wythe, in the limits of a short sketch, is to be had by considering in succession these aspects as presented in his subsequent history.

After his appearance in the House of Burgesses, in 1758, Wythe sprang at once to the front among the members. In 1759 he was appointed a member of the committee of correspondence, who were in-

vested with the control and direction of the colony's agent in England, Edward Montague, Esquire, of the Middle Temple. At the same session he was made one of the trustees charged with the duty of encouraging arts and manufactures in the colony by the judicious distribution of prizes and rewards. Then, in 1760, 1761, 1762, he was a member of the several committees appointed to examine and destroy all the paper money returned to the treasury for redemption. This paper money, which was issued to carry on the French and Indian War, was a legal tender, but as it was amply secured and had only short periods to run, it never occasioned any trouble in Virginia.

Mr. Wythe represented the College in the House of Burgesses till the year 1763, when he removed to his estate in Elizabeth City County, after which time he was the presiding justice of the county court, and regularly represented the county in the House of Burgesses for six years. He was one of the earliest and boldest defenders in the House of Burgesses, of the rights of the colonies, and after the British Parliament passed resolutions in March, 1764, declaratory of an intention to impose a stamp duty on the American colonies, he was one of the first to take solid ground that the only link of political connection between the colonies and Great Britain was the identity of the Crown, and that Virginia and the other colonies, were coördinate members of the British empire along with the elec-

torate of Hanover and the kingdom of Great Britain—a doctrine which received its first formal exposition in a pamphlet published by Richard Bland in 1766.⁶ When the House of Burgesses assembled in the fall of 1764, a committee was appointed, November 14, to draft suitable representations to the King, the House of Lords, and the House of Commons, respectively. The paper addressed to the Commons emanated from the pen of George Wythe, and following his declared principles, contained a vindication of the rights of America, which his colleagues subjected to material modifications. But even in the form in which the paper was finally adopted, this remonstrance against the Stamp Act was very bold and strong.⁷ After the passage of the Stamp Act, despite the protests of the colonists, Mr. Henry offered his famous resolutions in 1765, but these were opposed by Mr. Wythe, as well as by Peyton Randolph, Edmund Pendleton, Richard Bland, and other Virginia worthies who had long been the habitual leaders of the House. So far as Mr. Wythe was concerned, his opposition did not proceed from any real difference of principle with Mr. Henry, but further action was deemed by him premature until answers to the memorials forwarded to England had been received.

Wythe served as a representative from Eliza-

⁶ Reverend Andrew Burnaby, who visited Virginia in 1759, declared that this doctrine was, at the time of his visit, very widely held in Virginia.

⁷ Wirt, Patrick Henry, appendix.

both City County till 1768, when he was elected clerk of the House of Burgesses, and removed to Williamsburg. As clerk he coöperated in all the acts of the General Assembly in opposition to the new duties on glass, lead, tea, etc., and the following incident may be given in proof: Lord Botetcourt arrived as governor in November, 1768, and an assembly was called to meet in Williamsburg, May 11, 1769, at which time the House of Burgesses, being regularly organized, entered promptly upon the consideration of American grievances. While they were engaged in the work in secret session, Botetcourt, becoming suspicious of their proceedings, sent a request to Wythe for a copy of the House Journal, but Wythe contrived to put him off till the next day. On that day, when the Governor at length took alarm and summoned the members of the House of Burgesses to the Council chamber and dissolved them, his action came too late, for the delay which Wythe had brought about had enabled the House to complete its work, which consisted in a strong and elaborate remonstrance against the course of the British Government.

Six years longer Mr. Wythe continued clerk of the House of Burgesses and though he had no vote his opinions had much weight, and his influence was potent in shaping affairs.

In March, 1775, he was a member of the convention of delegates which met at Richmond to provide measures for the safety of the colony, and while op-

posing Patrick Henry's resolutions for organizing the militia in the different counties, he spoke in favor of Robert Carter Nicholas's proposition for raising a regular army of 10,000 men. Patrick Henry made a great speech on the occasion, and his clarion voice in favor of "Liberty or Death" has thrown discredit upon the votes of his antagonists, but it is proper to say that short enlistments were the bane of the Revolution, and Wythe saw at the outset the difficulties ahead, and lent cordial support to the sagacious scheme of Nicholas in making provision for a body of regular troops to serve during the war. Henry gave a remarkable proof of his estimate of Mr. Wythe's abilities, when he said: "Shall I light up my feeble taper before the brightness of his noontide sun? It were to compare the dull dew-drop of the morning with the intrinsic beauties of the diamond."

After the passage of Henry's measure, Wythe displayed his patriotism by joining a militia company in Williamsburg, wore a hunting shirt, carried a musket, and walked in the military parades which took place in the city during the latter part of Lord Dunmore's government.

In August, 1775, Mr. Wythe was appointed by the convention of Virginia to fill a vacancy in the Continental Congress, and in that body he strongly advocated in June of the next year, the resolutions for independence proposed by Richard Henry Lee pursuant to instructions from the convention of Vir-

ginia, adopted June 12, 1776, and he demonstrated the fervor of his patriotism not long after by attaching his signature to the Declaration of Independence drawn by Jefferson.

Mr. Wythe was elected by the city of Williamsburg to the December convention of 1775, but at the time he was absent from the city in attendance upon Congress, and Joseph Prentiss, afterwards judge of the General Court, took his place. He was again elected to the celebrated convention which met at Williamsburg in June, 1776, but Edmund Randolph was his alternate, and Wythe himself was not present until the close of the session, when as one of a committee of four he joined in preparing for the use of the new commonwealth, a seal which has justly been esteemed for its romantic and classical beauty. George Mason reported it to the convention, but in Girardin's continuation of Burk's "History of Virginia" it is said that Wythe was the originator; and as Girardin wrote under the supervision of Jefferson, who was keenly alive to all such matters, there can be no reason to doubt the truth of his statement. Moreover, Wythe was one of the two entrusted with the execution of the seal, and must have penned the words describing it, which have been admired for their clearness and precision: "Virtue, the genius of the commonwealth, dressed like an Amazon, resting on a spear with one hand, and holding a sword in the other, and treading on Tyranny, represented by a man prostrate, a crown

fallen from his head, a broken chain in his left hand, and a scourge in his right. In the exergue the word VIRGINIA over the head of Virtue, and underneath, the words *Sic Semper Tyrannis*. On the reverse a group: LIBERTAS, with her wand and *pileus*; on one side of her, CERES, with the cornucopia in one hand and an ear of wheat in the other; on the other side, AETERNITAS, with the globe and phœnix. In the exergue, these words: *Deus Nobis Hæc Otia Fecit* (substituted later by the word *Perseverando*). Severe in his republicanism, Wythe, like the other Virginians of the Revolution, had a scorn for "the aristocrat," and found his ideals in the Roman and Grecian Republics. Cæsar, Brutus, and Cicero were his names to conjure with, and his faith in the ability of man for self-government was stamped upon all his official action. While Massachusetts, Connecticut, Rhode Island, New Hampshire, along with New York, Pennsylvania, New Jersey, and Maryland, and even the United States government, clung to the old ideas of English heraldry and fashioned their seals of state on the principle of a coat of arms, Virginia, under the direction of Wythe, chose a purely classic design. She alone of the thirteen original states has no shield on which to emblazon in dazzling colors and lustrous metal the memory of feudal services, of the rich man's power and the poor man's thralldom; but the genius of her seal was made by Wythe, the Roman figure of Virtue, clad as an Amazon,

holding in one hand the spear of victory and in the other the sword of authority, and sternly republican in her motto of *Sic Semper Tyrannis*.

Mr. Wythe was after this a member of the House of Delegates, of Virginia, and on November 5, 1776, he was appointed one of a committee to revise the laws of the new state, and on December 4, 1776, Mann Page, Jr., was elected to succeed him in Congress. In May of the next year, being still a member of the House of Delegates, he defeated Robert Carter Nicholas for speaker by a vote of 37 to 33, a high tribute to his popularity and character as a man, for there were few men in the commonwealth as highly respected, for uprightness, for ability or for integrity of purpose, as his virtuous opponent. His service in the Legislature, however, was not long, as on January 14, 1778, he qualified as one of the first chancellors of the state. Ten years later, while still holding that office, he was elected a member of the Federal convention, which met in 1787 in Philadelphia. But though he appeared in the Convention, and took part in the organization, it does not seem that he remained very long, his duties as chancellor doubtless requiring his presence in Richmond. In 1788 he was elected to represent the city of Williamsburg in the State convention, called to consider the new Federal constitution proposed the previous year by the Federal convention of Philadelphia. There were one hundred and sixty-eight members. Mr. Wythe was elected chairman

of the committee of the whole, in which most of the business of the convention was transacted.

During the greater part of the session he mingled very little in the debates, but when the time came for the important work of approving or rejecting the proposed Federal constitution, he left the chair, and offered a resolution of ratification, which he defended in a speech that made great impression upon the members. In this speech he admitted the imperfections of the Constitution and the propriety of some amendments, but he claimed that the excellency of its many parts could not be denied even by its warmest opponents. He thought that experience was the best guide, and that the future could alone develop the consequences, as most of the improvements that had been made in the science of government and other sciences were the results of experience. The resolution of ratification proposed by Wythe contained the proviso that "the powers granted under the Constitution being derived from the people of the United States, might be resumed by them whensoever the same should be perverted to their injury or oppression, and, therefore, that no right of any denomination could be cancelled, abridged, restrained or modified by the Congress, by the Senate or the House of Representatives acting in any capacity, by the president, or any department, or any officer of the United States, except in those instances in which the power was given by the constitution for those purposes." In this form Wythe's

ratification was adopted, and a series of amendments drawn by Patrick Henry was recommended to Congress, several of which afterwards were approved by the states and made a part of the Constitution. After the organization of the new Federal government, Mr. Wythe allied himself, in the divisions that arose upon the construction of the Constitution with the Republican party, of which his pupil, Mr. Jefferson, was the head; and we hear of him at a later date as presiding over two of the electoral colleges, which met in Virginia to give their votes for president and vice-president of the United States.

In his character as teacher, Mr. Wythe attained to quite as high a reputation among the people of Virginia, as in the character of statesman. He was a close and indefatigable student of science and the ancient languages, as well as of the law, and he loved to discuss questions of natural philosophy with Governor Fauquier, who was himself a fellow of the Royal Society of Great Britain, and a man of real industry and great learning. Now, it chanced that from 1758 to 1764 the chair of mathematics and natural philosophy, at the college of William and Mary was filled by Dr. William Small, a man of elegant manners, of general culture, and of a peculiarly liberal and comprehensive mind. He was the intimate friend of Watt, the inventor of the steam engine, and of Erasmus Darwin, an eminent English scientist, and grandfather of the Darwin who in our day startled the world with his theory of evolution.

Dr. Small left a lasting impression upon the college by introducing the lecture system, and popularizing the study of natural science, for which department in the College he went especially to England and purchased an extensive apparatus. He was a congenial and constant companion of Wythe's, and they became successively the instructors of the youthful Jefferson, who entered college in 1760, and after remaining two years under Small, studied law for five years under Wythe. It is a striking picture which the facts present of these three great men—Small, Wythe, and Jefferson—engaged at the familiar table of Governor Fauquier in erudite conversation on the laws of nature and the rights of man afterwards exemplified in the principles of the American Revolution. Indeed, there is something curious in a young law student like Thomas Jefferson choosing Mr. Wythe as his instructor, when Peyton and John Randolph, sons of his great-uncle, Sir John Randolph, were also living in Williamsburg, and were eminent lawyers and his attached friends. This circumstance, while partially explained by Mr. Wythe's reputation for learning, was doubtless chiefly attributable to the talent for teaching, which was early displayed by him, and which after some years led to his election, by the board of visitors of William and Mary College, to fill the new chair of law and police established in the institution by Mr. Jefferson at the reorganization of the college curriculum in 1779. In this professorship Mr.

Wythe remained for twelve years, and he has the honor of having been the first university law professor in the United States, and the second in the English-speaking world—Sir William Blackstone, who filled the Vinerian chair of law at Oxford in 1758, being the first.

Most of the students at William and Mary College during Wythe's incumbency fell under his instructions, and we are told that his class, in 1780, numbered about forty young men; and although owing to the loss of records, not all their names are preserved, the presence among them of John Marshall, the celebrated chief-justice, and of James Monroe, who is world-known because of the governmental doctrine which bears his name, is a reasonably good indication of their intellectual superiority. One form of Wythe's instructions was the lecture system, borrowed from his friend, Dr. Small, and his subject matter was municipal and constitutional law, in the treatment of which he was far from being a servile copyist of Blackstone. Indeed, the new system of written constitutions adopted in America opened a field of thought to which Blackstone was a stranger, and Wythe has the honor of being the first regular commentator upon the changes brought about by the new instruments of government in American jurisprudence.⁸ But

⁸ Mr. Wythe's manuscript lectures were extant in 1810, when they are noticed in a letter from Judge John Tyler (father of President Tyler) to Mr. Jefferson. Judge Tyler writes in regard to them: "They are highly worthy of publication, and it is a pity that they should

besides the lecture system, there were two other modes of instruction relied upon by Mr. Wythe, which were original with him. As the seat of government, in 1779, was removed to Richmond, the old historic capitol building at the east end of Williamsburg was left untenanted, and Wythe availed himself of this deserted structure to institute a moot court and a moot legislature in the room formerly occupied by the General Court of the colony.

The moot court was held once or oftener every month, and Mr. Wythe and the other professors of the College sat as judges; and before an audience consisting of the most respectable of the citizens of Williamsburg, causes suggested by him were pleaded by the students "in a very lawyer-like manner," it is said. The moot legislature met every Saturday, and Mr. Wythe, forming the young men into a house of delegates, acted as speaker and took all possible pains to instruct them in rules of debate and parliamentary procedure. He was at this time engaged in revising the laws of the state, and the bills drawn up for the legislature were put in the hands of the students, and by them were very freely debated and amended. These exercises were useful, not only by reason of the instruction afforded, but because they served as a very popular relaxation after the study of text-books and attendance in the classroom.

be lost to society and such a monument of his memory be neglected." Letters and Times of the Tylers, vol. I, 249.

Mr. Wythe was a warm opponent of negro slavery, and his teachings no doubt had much to do with producing that spirit of philanthropy which prevailed in Virginia till a reaction was caused, in 1833, by the violent assaults of the abolitionists. A letter, in 1785, by Mr. Jefferson to Dr. Price has a reference to the College and Mr. Wythe in connection with slavery, which is interesting: "The College of William and Mary in Williamsburg since the remodelling of its plan is the place where are collected together all the young men of Virginia under preparation for public life. They are there under the direction (most of them) of a Mr. Wythe, one of the most virtuous of characters, and whose sentiments on the subject of slavery are unequivocal. I am satisfied, if you could resolve to address an exhortation to these young men, with all that eloquence of which you are master, that its influence on the future decision of this important question would be great, perhaps decisive."

In addition to his lectures on law and police, Wythe, in 1787, opened a class in Williamsburg for the study of the higher Latin and Greek classics and the most approved English prose and poetical writers.⁹ He asked no compensation of those who availed themselves of this opportunity, but the self-imposed labor was one of the many instances of his active philanthropy.

Mr. Wythe continued to lecture at William and

⁹ Virginia Gazette, July 1787.

Mary till 1791,¹⁰ when, having been appointed sole chancellor of Virginia, he resigned his chair and removed to Richmond. At his departure the faculty testified to their appreciation of his character and ability by conferring upon him the degree of Doctor of Laws.

He nevertheless continued his roll of instructor till his death, fifteen years later; for, harassed as he was with business, he yet, for many years, in Richmond, found time to keep a private school for the instruction of a few young men. Among the last to fall under his influence was Henry Clay, who, in 1793, at the age of sixteen, became a clerk in the office of the court over which Wythe presided. In his sketch of Mr. Wythe, Mr. Clay concludes with an acknowledgment that "to no man was he more indebted, by his instructions, his advice and his example, for the intellectual improvement which he made up to the period when in his twenty-first year he finally left the city of Richmond for Kentucky." Indeed, no more suggestive or interesting painting could be had than one representing George Wythe as a teacher surrounded by those who received the benefit of his training and instruction. Some of the greatest luminaries at the bar and in politics, which the Union has produced, were instructed in law and science and led up the "Steep of fame" by George Wythe. In the list of his pupils we may enumerate two presidents of the United States, Thomas Jeffer-

¹⁰ William and Mary College Quarterly, vol. VIII, 155.

son and James Monroe; the greatest of America's judges, John Marshall; and a number of other prominent lights, only one degree inferior in brightness to Marshall himself—St. George Tucker; Spencer Roane; Archibald Stuart; John Wickham; John Brown, of Kentucky; James Breckenridge; John Coalter; Littleton Waller Tazewell; Buckner Thurston; William Munford; James Innis; George Nicholas; and Henry Clay.

We have spoken of Mr. Wythe's acquaintance with the ancient languages, which was very profound; but he was also proficient in Spanish and Italian, and doubtless derived great benefit in this particular by his association, while professor of law, with Charles Bellini, who held the chair of modern languages at William and Mary College—like Mr. Wythe's chair, the first of its kind in the United States. William Munford, who was a pupil of his in Williamsburg, relates that he received from Mr. Wythe, after he removed to Richmond, many kind notes which were interspersed with Greek and Latin sentences, showing the evident pleasure he took in the study of those languages. While resident in Richmond, Mr. Wythe took up the study of Hebrew, pursuing it closely with grammar and dictionary, and once a week a Jewish Rabbi by the name of Seixas attended him to see how he progressed and to give him advice.

The character of Mr. Wythe, as a representative of the legal profession, comes last to be considered.

After he had once conceived the idea of devoting himself to the mastery of the law, he applied himself with unwearied diligence to the thorough study of all the great English and Latin law writers. He read deeply and pondered upon what he read, and to his almost universal knowledge upon the subject he united an appreciation of the dignity of his profession which never permitted him to champion an unjust cause. It was his habit, in case he entertained any doubts of the truth of his client's statements, to require of him an oath; and if in any stage of the case he found that deception had been practiced upon him, the fee was returned and the case abandoned. His experience as a practitioner of law extended from 1746 to 1777; and from the County Court he passed, in due time, to the General Court, where his industry was quickened, and his emulation excited by a competition with men who had studied at the English Inns of Court.

Among his rivals at the bar, the most formidable was Edmund Pendleton, who resembled Lord Mansfield in the character of his intellect, and who from his twelfth year had never lost a day from the eager pursuit of his profession. He had the advantage of Wythe in personal appearance which was singularly handsome, in his voice which was clear and silver-toned, and in his manners which were charming and fascinating. But as actors on the stage, while Pendleton was cautious and conservative, Wythe was bold and aggressive. Then,

Pendleton was far from possessing the information of Wythe, and he was rather a great advocate than a deep lawyer. Nevertheless, in debate, while Wythe was more solidly argumentative, Pendleton was more subtle and captivating; and in their frequent contests at the bar the advantage, in the popular judgment, lay as a rule with Pendleton. Wythe generally bore these apparent defeats with reserve and equanimity, but he lacked neither quickness of parts nor colloquial talents; and sometimes, when aroused by some improper remark, he would swiftly retort with terrible severity. A story is told of a remark made by him to Lord Dunmore, which illustrates his wit and talent for biting sarcasm. One day in the General Court, where Lord Dunmore presided as chief justice, Wythe and Robert Carter Nicholas appeared for one side of the cause, and Mr. Pendleton for the other. The case being called, Mr. Wythe expressed himself in favor of an immediate trial, but Pendleton desired a continuance, as Mr. Mason, his colleague, was absent and there were two counsel on the other side. Lord Dunmore did not like Wythe, and, forgetting the dignity of his position, had the indelicacy to say: "Go on, Mr. Pendleton, for you will be a match for both of them." "With your Lordship's assistance," retorted Wythe, bowing with mock politeness. Dunmore showed by his change of countenance that he felt the sting which his imprudence had provoked, but he said nothing, and the

audience was delighted with Wythe's intrepidity.

As a member of the committee to revise the laws of the new commonwealth of Virginia, Mr. Wythe's work was highly important. The members met at Fredericksburg, January 13, 1777, and distributed the work. The common law and English statutes to 4 James I. when the colony was established at Jamestown, were assigned to Jefferson; the British statutes, from that period to the time of the revisal, to Mr. Wythe; and the Virginia laws to Mr. Pendleton. They were employed in this work from that time to February, 1779, when the three great lawyers met at Williamsburg and day by day examined critically their respective labors, scrutinizing and amending until they had agreed on the whole. The work, when completed, consisted of one hundred and twenty-six bills, making a printed folio of ninety pages only. All the ancient laws, found inapplicable to the powers of government as then organized, or founded on principles foreign to republican spirit, and all others which long before such change had been found oppressive to the people, but could not be repealed while the regal power continued, were omitted; and the statutes recommended were relieved of their verbosity and endless tautology. The bills prepared by the revisers were reported to the Assembly on June 18, 1779, and published by its order. Some of these bills were occasionally adopted before 1785; but it was not until that year that the report of the revisers was taken

up in a regular manner, when most of them, under the management of James Madison, passed into law.

In the meantime, an act was passed in October, 1777, to create for the state a court of chancery, which, as first composed, consisted of Pendleton, Wythe, and Robert Carter Nicholas; and in 1783 the members of this court were instructed by the Legislature to cause all the acts of assembly, subsequent to 1779, and the ordinances of the convention in force, to be collected into one code with proper index and marginal notes. The then chancellors, Edmund Pendleton, George Wythe, and John Blair made a communication on the subject in November, 1783, and in 1785 their edition was printed at Richmond by Thomas Nicholson and William Prentiss. Though generally called the Chancellors' Revisal, it was rather a collection of the laws than a revisal of them.

By virtue of his office as one of the three chancellors of the state, Mr. Wythe was also a member of the Supreme Court of Appeals, and in 1782 there came before this court an interesting case entitled in the reports *Commonwealth against Caton*, involving the question of the overruling power of the judiciary. It appears that three men were tried by the General Court and condemned to death, but to escape execution they made application to the pardoning power, which, pursuant to the Constitution, was vested by an act of the Legislature in the two Houses of the General Assembly; and the House of Dele-

gates, making only one branch of the General Assembly, assumed to pass a resolution of pardon, which was pleaded at the bar by the prisoners. The Attorney-General denied the validity of the plea, and the General Court adjourned the case "for novelty and difficulty" to the Court of Appeals. Here Pendleton, the president of the court, did not choose to regard the act of the House of Delegates as indicative of an intention to assert power, since, by sending their resolution to the Senate, they appeared to have suspended its operation until the consent of the Senate could be obtained. He therefore decreed that really no action had been taken by either branch, and overruled the plea of pardon, simply referring to the question of the controlling authority of the judiciary as a "tremendous question," which he trusted the prudence of the legislature, by making the principles of the Constitution the great rule to direct the spirit of their laws, would forever render unnecessary to decide. But his colleague, Wythe, always bolder in action and greater in spirit, met the issue without reserve; and with a burst of eloquence, which even now is calculated to stir the blood and quicken the heart, spoke from the bench as follows:

Among all the advantages, which have arisen to mankind, from the study of letters, and the universal diffusion of knowledge, there is none of more importance, than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and upon the powers which the different branches of government may exercise. For, by this means, tyranny

has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted. But this beneficial result attains to higher perfection, when, those who hold the purse and the sword differing as to the powers which each may exercise, the tribunals who hold neither are called upon to declare the law impartially between them. For thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established. Under these impressions I approach the question which has been submitted to us; and, although it was said the other day by one of the judges, that, imitating that great and good man, Lord Hale, he would sooner quit the bench than determine it, I feel no alarm; but will meet the crisis as I ought; and, in the language of my oath of office, will decide it, according to the best of my skill and judgment.

I have heard of an English chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is equally mine to protect one branch of the legislature and, consequently, the whole community, against the usurpations of the other; and, whenever the proper occasion occurs, I shall feel the duty and fearlessly perform it. Whenever traitors shall be fairly convicted, by the verdict of their peers before the competent tribunal; if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate, sitting in this place, to say to the general court, *Fiat justitia, ruat cælum*; and, to the usurping branch of the legislature, "you attempt worse than a vain thing; for, although, you cannot succeed, you set an example which may convulse society to its centre." Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my

seat in this tribunal, and, pointing to the constitution, will say to them, "here is the limit of your authority; and hither shall you go, but no further."

The principle thus eloquently affirmed by George Wythe, for the first time in the history of the world, and now universally accepted, has been pronounced by Lord Brougham "the greatest refinement to which any state of circumstances has ever given rise or to which any age has ever given birth."

In 1788 the number of judges in the Court of Chancery was reduced to one, and the court was required to meet four times in every year at the capitol in Richmond. Thus Wythe became sole chancellor of Virginia, and his jurisdiction extended over the whole state till 1801, when the state was divided into three chancery districts, and he was assigned to what is known as the Richmond District. The seal of the High Court of Chancery was prepared by Wythe, who consulted the celebrated painter, Benjamin West, of Pennsylvania; and the devices adopted are a perpetual memento of the stern and virtuous impartiality that characterized the office. Wythe took the legend of Sisamnes, which, as told by Herodotus, asserts that for accepting a bribe King Cambyzes had Sisamnes killed and flayed, and his skin cut in straps and stretched about the judicial seat. He then appointed, as judge, Sisamnes' son, Otannes, and told him to remember the seat upon which he sat to administer justice.

In another case, Judge Wythe showed the strength

and independence of character which so eminently distinguished him. The recovery of debt due by American citizens to British subjects was made the subject of the sixth article of the Treaty of Commerce negotiated by John Jay, in 1794, with Great Britain. Now, the enforcement of this article was very unpopular in Virginia, since, instead of performing their engagements under the treaty of peace the British had not withdrawn their troops from the western posts, nor taken any steps to pay for the slaves abstracted during the war. Chancellor Wythe was the first judge to decide that the claims were recoverable, and his decision was given in a case in which the complainant was an alien and late enemy, and the respondent was the state of Virginia. This decision rendered him unpopular in Virginia for a time, but it was not long before the condemnation was forgotten in admiration for the man's independent and disinterested conduct. Thus Mr. Wythe continued in the office of chancellor for many years, and his course was deeply impressed with the most scrupulous impartiality, rigid justice, unremitting assiduity, and the purest unselfishness.

Mr. Clay tells the following stories of Mr. Wythe:

A neighbor of his, Mr. H —, who had the reputation of being a West India nabob, and who at the time had an important suit pending in the Court of Chancery, sent him a demijohn of old arrack and an orange tree for his niece, Miss Nelson, then residing with him. When the articles were brought into Mr. Wythe's house, with the message from the donor, Mr. Wythe requested the servant to take them back to his master and to

present to him his respects and thanks for his kind intentions, but to say that he had long ceased to make any use of arrack, and that Miss Nelson had no conservatory in which she could protect the orange tree. I was amused at another scene, which I witnessed, between him and the late Justice (Bushrod) Washington of the Supreme Court, then practising law in the city of Richmond. He called on the Chancellor with a bill of injunction in behalf of General —, to restrain the collection of a debt. The ground of the application was that the creditor had agreed to await the convenience of General —, for the payment of the debt, and that it was not then convenient to pay it. The Chancellor attentively read the bill through, and deliberately folding it up, returned it to Mr. Washington, enquiring with an ineffable smile upon his countenance, "Do you think, sir, that I ought to grant this injunction?" Mr. Washington blushed and observed that he had presented the bill at the earnest instance of his client.

So great was the love and admiration entertained in Virginia for Mr. Wythe that Virginians, who were fond of finding ideals in classic literature and never tired of appealing to the example of Roman and Grecian heroes, were in the habit of comparing Wythe to Aristides, and delighted to think that the appellation of "The Just" could not be more appropriately applied than to one of their own countrymen.

Mr. Wythe was generally sustained in his opinions by the Supreme Court, but, of course, he was sometimes reversed, and in 1795 he published a book entitled "Decisions of Cases in Virginia by the High Court of Chancery, with remarks upon decrees by the Court of Appeals reversing some of those deci-

sions." Perhaps the chief object of Mr. Wythe was to make a contribution to the legal literature of the country, but there can be no doubt that he also desired to vindicate his decisions from the opposite opinions of the Appellate Court. In more than one of his "comments" there is just a suspicion of personal feeling, for it is said that, owing to their frequent collisions before the public, his relations with Mr. Pendleton, president of the Court of Appeals, were somewhat constrained. Mr. Wythe's Reports show great learning, and familiarity with Greek and Latin authors, which are frequently quoted, but his English is very often involved and complicated—a fact which may be partially due to his having to depend upon a young amanuensis to take down his words, rheumatism or gout having deprived him of the use of his right hand. Before this misfortune befell him, Mr. Wythe showed in the character of his handwriting the spirit of simplicity which distinguished his every day conduct. He wrote in two handwritings—one resembling print, and the other a running hand; and it was his practice to use the small "i" for the first person, and never to begin the sentence with a capital other than when it began a paragraph. Mr. Jefferson, his pupil, who wrote with greater correctness, adopted also the same rules of chirography, though he did use the capital "I."

About 1755, Wythe, who, as stated, had lost his first wife in 1747, married Elizabeth Taliaferro, daughter of Richard Taliaferro, of James City

County. His residence in Williamsburg, which was the gift of his father-in-law, is still standing, and is situated near the old Episcopal church facing the Palace Green.¹¹ It is a large brick building, and, when the American army in pursuit of Lord Cornwallis encamped in the neighborhood, this old house was selected for the headquarters of the Commander-in-chief, and is cherished and venerated for its two-fold associations with the names of Wythe and Washington. When Wythe removed to Richmond, in 1791, he resided in a yellow wooden house with a hip roof, situated on the corner of Fifth and Grace streets, and the garden attached to it extended to Franklin street and embraced half the square. For several years after Wythe's decease the lot was cultivated as a market garden, and the house, after lying untenanted many years, was taken possession of by some youths of the city, who knocked down the partition, and used it as a play house, where amateur theatricals were had. The garden and ruins of the house have now made way for some of Richmond's handsomest residences. The only child Mr. Wythe ever had died in infancy and he outlived his second wife several years.

Mr. Wythe's instincts, like those of his pupil, Mr. Jefferson, were all in favor of personal liberty, and he showed the faith that was in him by his admonitions, as already noticed, to the young men under his care, and by the enfranchisement in his will of three of

¹¹ William and Mary College Quarterly, vol. XII, 124.

his own slaves, to whom he gave sufficient to free them from want. One of these, a negro boy, he had instructed in the Latin and Greek languages, and the clause in the will for his support was coupled with the provision that if the negro boy should die before his full age, the bequest for him should enure for the benefit of George Wythe Sweeney, one of his great-nephews. This clause is believed to have been the innocent cause of Judge Wythe's decease. Avarice overpowered the favorite nephew, and to get immediate possession of the devise, he put arsenic in a pot of coffee which he supposed the negro boy would be the only one to use. But it happened that Judge Wythe also drank of the coffee, and both were fatally affected. The negro boy died first, and the dying Chancellor made haste to revoke all the devises to his wicked nephew, and by a codicil left the estate to the other grandchildren of his sister, to be equally divided among them.

The inspiration of duty was with him to the last, for though tortured on the bed of sickness for over a week by the agonies produced by the poison, his thought kept reverting to the cases pending in court, and he expressed much regret over the delay and consequent expense which his death would impose upon the parties to suits. He died in the midst of this benevolent anxiety, June 8, 1806, in the eighty-first year of his age, and among the last words he uttered were: "Let me die righteous!"

George Wythe Sweeney was arrested, and in Sep-

tember, 1806, was tried at the bar of the General Court for the murder of his uncle and the negro boy, but for lack of legal testimony he was acquitted by the jury, a result which did not, however, shake the confidence of the people at large in the guilt of the accused. He was not released at once; for, as four other indictments had been found against him for a misdemeanor in obtaining money the preceding April from the Bank of Virginia upon a false check in the name of Wythe, he was tried for this matter, convicted and condemned to six months in jail and one hour's exposure in the pillory in the market house in the city of Richmond. But this sentence was never executed, as, upon a motion for an arrest of judgment, the court suspended the punishment, and the prosecuting attorney entered a *nolle prosequi*. The unfortunate man then sought refuge of the west, where he died prematurely and miserably.

Mr. Wythe's death created a profound impression in Virginia; he was given a public funeral in which the state and municipal authorities in all departments joined, and he was buried in the cemetery of old St. John's Church, Richmond, where Patrick Henry made his great speech in 1775 in favor of arming the militia of the colony. William Munford, Wythe's friend and pupil, delivered the funeral oration, and bore testimony to the quiet Christian virtues of which he was possessed. The current publications express the public sentiment. The

Richmond Enquirer commented upon the funeral ceremonies as follows:

Need it be said that the crowd which assembled in the capitol was uncommonly numerous and respectable? After the delivery of a funeral oration by Mr. William Munford, a member of the Executive Council, the procession set out towards the church. It is no disparagement to the virtues of the living to assert that there is not perhaps another man in Virginia whom the same solemn procession would have attended to the grave. Let the solemn and lengthened procession which attended him to the grave declare the loss which we have sustained!

Thus ended the career of George Wythe, and this sketch may be concluded with some few further testimonials to his worth.

George Wythe Munford, son of William Munford, above named, thus recorded what he had learned from his father, and from others who knew Mr. Wythe:

As a chancellor, in his court-room, in the basement of the Capitol, which was rarely occupied by more than a few members of the bar and a few suitors, without insignia of office and only his innate dignity to support him, men might transact their business without reflecting upon the inestimable value of a judge uncontaminated by prejudice or partiality, or meaner selfishness, upon whose pure decision their property depended. They knew he held the even scales of justice well balanced in his hands, and that nothing but undoubted equity and law could turn those scales to the right or left; still, no outward demonstration of more than ordinary respect was ever exhibited. In these days, when it is not uncommon to hear notable contrasts drawn between some unworthy judges who have soiled the judicial ermine and

brought their decisions and illegal acts into disrepute and themselves into contempt, it may not be considered useless to review some incidents in the life and character of such a man as George Wythe, and hold him up as an exemplar of a patriot, jurist, and pure Virginian. It is a pleasure to us to dwell for a moment upon the personal appearance of this remarkable man.

He was one of those that a child could approach without hesitating or shrinking,—would talk to, in its innocent prattle, without constraint of fear,—would lean upon, and, looking in his face, return a sympathetic smile. He was one of those before whom a surly dog would unbend, and wag his tail with manifest pleasure, though never seen before. Animals and children are guided in their affections or dislikes by the countenance and the manner.

His stature was of the middle size. He was well-formed and proportioned, and the features of his face manly, and engaging. In his walk, he carried his hands behind him, holding the one in the other, which added to his thoughtful appearance. In his latter days he was very bald. The hair that remained was uncut, and worn behind, curled up in a continuous roll. His head was very round, with a high forehead; well-arched eyebrows; prominent blue eyes, showing softness and intelligence combined; a large aquiline nose; rather small, but well-defined mouth; and thin whiskers, not lower than his ears. There were sharp indentations from the side of the nose down on his cheek, terminating about an inch from the corner of his mouth; and his chin was well-rounded and distinct. His face was kept smoothly shaven; his cheeks, considerably furrowed from the loss of teeth; and the crow's feet very perceptible in the corners of the eyes. His countenance was exceedingly benevolent and cheerful.

His dress was a single-breasted black broadcloth coat, with a stiff collar turned over slightly at the top, cut in front Quaker fashion; a long vest, with large pocket-flaps and straight collar, buttoned high on the breast, showing the ends of the white cravat that filled up the bosom. He wore shorts; silver kneecaps.

and shoe buckles; was particularly neat in his appearance, and had a ruddy healthy hue. He had a regular habit of bathing, winter and summer, at sunrise. He would put on his morning wrapper, go down with his bucket to the well in the yard, which was sixty feet deep and the water very cold, and draw for himself what was necessary. He would then indulge in a potent shower-bath, which he considered the most inspiring luxury. With nerves all braced, he would pick up the morning *Enquirer*, established about two years before, and seating himself in his arm-chair, would ring a little silver bell for his frugal breakfast. This was brought immediately by his servant woman, Lydia Broadnax, who understood his wants and his ways. She was a servant of the olden time, respected and trusted by her master, and devoutly attached to him and his—one of those whom he had liberated, but who lived with him from affection.

Nathaniel Beverley Tucker, son of St. George Tucker, Wythe's successor in the chair of law at the College of William and Mary, wrote thus of his early recollections of Wythe:

I have still in my mind's eye a tall, pale, extenuated old man that I used to see walking silent and alone before the door, and whom we boys always beheld with a feeling akin to superstitious awe.

Then, Henry Clay used these words:

Mr. Wythe's personal appearance and his personal habits were plain, simple and unostentatious. His countenance was full of blandness and benevolence, and I think he made, in his salutations of others, the most graceful bow that I have ever witnessed. A little bent by age, he generally wore a grey coating. And when walking carried a cane. Even at this moment, after the lapse of more than half a century since I last saw him, his image is distinctly engraved on my mind."

Finally, Thomas Jefferson's estimate of Wythe was as follows:

No man ever left behind him a character more venerated than George Wythe. His virtue was of the purest tint; his integrity inflexible, and his justice exact; of warm patriotism, and, devoted as he was to liberty, and the natural and equal rights of man, he might truly be called the Cato of his country, without the avarice of the Roman; for a more disinterested person never lived. Temperance and regularity in all his habits gave him general good health, and his unaffected modesty and suavity of manners, endeared him to every one. He was of easy elocution, his language chaste, methodical in the arrangement of his matter, learned and logical in the use of it, and of great urbanity in debate; not quick of apprehension, but, with a little time, profound in penetration, and sound in conclusion. In his philosophy he was firm, and neither troubling, nor perhaps trusting any one with his religious creed, he left the world to the conclusion, that that religion must be good which could produce a life of such exemplary virtue.

His stature was of the middle size, well formed and proportioned, and the features of his face were manly, comely, and engaging. Such was George Wythe, the honor of his own time and the model of future times.

The salient points in Wythe's career may be summed up as follows: As a statesman he was identified with the most advanced views as to the relations of the colonies with Great Britain, and both defended and signed the Declaration of Independence. He was the author of the beautiful state seal of Virginia and one of the chief causes of the adoption of the Federal Constitution by Virginia; as a

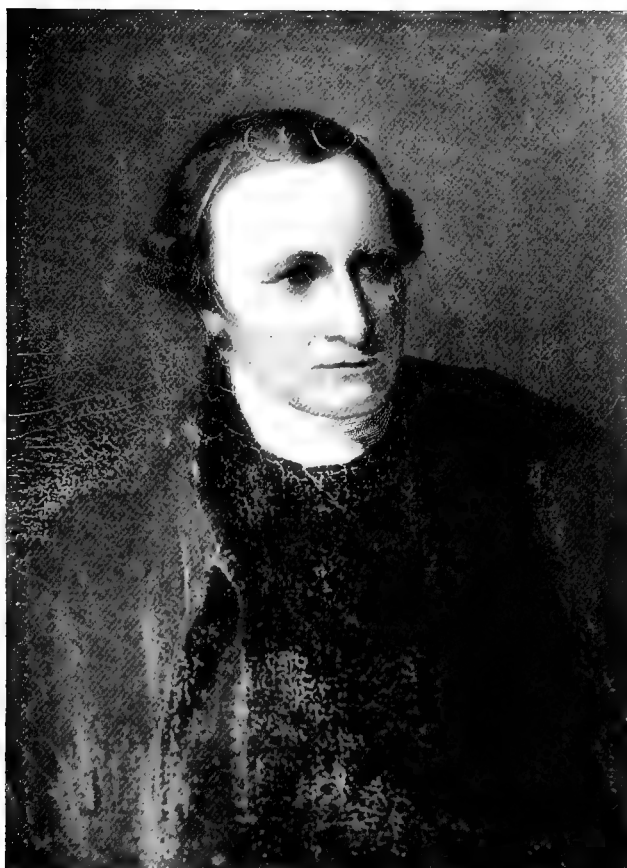
teacher, he was the first law professor in the United States and set the example of moot courts and moot legislatures. And as a lawyer and judge, he was profound and absolutely just, had a great part in shaping the first laws of the infant commonwealth, was the first to lay down the great principle of the overruling power of the judiciary, and dared to afford the example, as he did in the British debt cases, of a judge utterly fearless of popular influence.¹²

¹² Authorities: Hening, *Statutes at Large*; Grigsby, *Convention of 1766*; *Journal of the House of Burgesses*; Sanderson, *Signers of the Declaration of Independence*; Munford, *Two Parsons*, 1884; Wythe, *Chancery Cases*, 2d ed., by B. B. Minor; Munford, *Oration on Wythe's death* in *Richmond Enquirer*, June 10, 1805; 4 *Call's Reports*, 10; Henry Clay, *Sketch of George Wythe*, in *Virginia Historical Register*, vol. v, 162; *Elizabeth City County Records*; Hayden, *Virginia Genealogies*, p. 381; *Virginia Cases*, annotated, 1903; *William and Mary College Quarterly Historical Magazine*; Burk, *History of Virginia*; Wirt, *Life of Patrick Henry*.

PATRICK HENRY.

PATRICK HENRY

From the portrait by Thomas Sully in the Virginia State Library
at Richmond.



PATRICK HENRY.

1736-1799.

BY

ADELE COOPER SCOTT.

Be of good courage, my son, and remember that the best men always make themselves.—Patrick Henry.¹

THE traditional Patrick Henry is he of the tongue of flame. Such he was and more: a man of ideas and purpose, whose genius was the inspiring and animating force. He moved men not by skillfully turned phrase, mere play of words, and power of forensic appeal alone; for these, however fascinating, could not of themselves have accomplished results, had there not been behind them real manhood and the power that comes from strong opinions, strongly felt. He thrilled men for he knew men; they had been his study from his youth—all kinds and classes, the workers young and old, the ignorant and the lettered. He had mingled with mankind in the country store, by the roadside, at the camp-meeting, in court, in church, and in the neighborhood social gatherings. People

¹ The following sketch is based upon a careful study of the standard biographies of Patrick Henry by William Wirt, Fifteenth Edition, 1852; Moses Coit Tyler, in the American Statesmen Series, Revised Edition, 1898; and the elaborate and painstaking appreciation by Patrick Henry's grandson, William Wirt Henry, (3 vols.) 1891.

possessed for him a peculiar interest, and a certain sweetness of nature and love for his fellows remained with him through all the stern experiences of his life. He fought well but he could not hate his adversaries; his imagination and his heart were always in his cause, and carried with them the whole force and strength of the man. At times he struck hard blows and usually won, bearing from the field of conflict scars but no malice. He was to make abundant enemies, as will appear; he was to cause alarm in many thoughtful and conservative minds; was to arouse the hatred of the old leaders in colonial politics, and the envy of the young aspirants for political favor; he was to upset all sorts of plans of many worthy citizens; but through it all he was to be the popular idol of the Virginians, and was to retain their loyalty and almost idolatrous affection as long as he lived—and longer. The mysterious hold he had upon the mass of the people of Virginia is an historic fact to be accepted, and perhaps can best be explained by the warmth of sympathy and the real love for mankind which gave to his oratory its human touch.

Patrick Henry was born May 29, 1736, on the family estate of Studley, in the county of Hanover and the colony of Virginia; the second son in a family of nine children born to John Henry and Sarah Winston Syme Henry. His parents were among the most respectable in the colony and though possessed of little material wealth, they could

yet boast a lineage "more respected for their good sense and superior education than for their riches."

His mother was the daughter of Isaac Winston and Mary Dabney the widow of Colonel John Syme, who died about 1731, leaving one child, a son. Those who knew the family of the Winstons and the mother of Patrick Henry were wont to believe that he derived his most characteristic traits, both of genius and disposition, from her. The Winstons of Virginia were of Welsh extraction, and as a family were marked by spriteliness of demeanor, conversational talent of a vivacious sort, a love for music and eloquent speech, combined with a fascination for the pleasures of country life, fishing, hunting, and the charms of nature. Mr. Wirt says that Patrick Henry's uncle, William Winston, own brother to his mother, had a power of eloquence so dazzling and wonderful that he was only second to Patrick Henry among all the great speakers of Virginia.

His father, John Henry, was of sterling Scotch ancestry, and emigrated to this country sometime prior to 1730. He was a native of Aberdeen, Scotland, the son of Alexander Henry and Jean Robertson, a sister of the Reverend William Robertson, who in turn was the father of Reverend William Robertson, the distinguished scholar and divine.

Also among the later paternal relatives of Patrick Henry was one possessed of forensic and oratorical genius of a brilliant quality not unlike his own.

Patrick Henry's father was second cousin to the charming Eleanor Syme, who became the wife of Henry Brougham and the mother of Lord Brougham, who considered himself indebted to his mother for his talents. Lord Brougham was thus third cousin to Patrick Henry.

"To some it will perhaps seem not a mere caprice of ingenuity to discover in the fiery, eccentric, and truculent eloquence of the great English advocate and parliamentary orator a family likeness to that of his renowned American kinsman; or to find in the fierceness of the champion of Queen Caroline against George IV., and of English anti-slavery reform and of English parliamentary reform against aristocratic and commercial selfishness, the same bitter and eager radicalism that burned in the blood of him who, on this side of the Atlantic, was, in popular oratory, the great champion of the colonies against George III., and afterward of the political autonomy of the State of Virginia against the all-dominating centralization which he saw coiled up in the projected Constitution of the United States."²

John Henry was a man of sound intellect and solid understanding, and had received a liberal classical education in Scotland. He was held in high esteem in his neighborhood in Virginia as being possessed of irreproachable integrity and superior intelligence, as is evidenced by the positions he held of county surveyor, colonel of his regiment of militia, and presiding magistrate of the county of Hanover.

From such a parentage a child could justly claim

² Tyler, p. 3-4.

some inheritance of brains; however, Patrick Henry owed no part of his greatness to the lustre of birth but was indeed the founder of his own fortunes. Of the little brood that came to the home he was the only eagle, the rest were quiet birds. As a child, probably he gave more anxious thought to his parents than all the others, for he had an indolent disposition, averse to study and enamored with the free life of nature; roaming the fields and forests in search of game, or lying quietly by the brookside, unconsciously learning the lessons nature teaches the solitary thinker while awaiting the occasional nibble at his hook. Here he found "sermons in stones, books in the running brooks," and these were perhaps the "books" with which he was always most intimately acquainted. In very truth, not all knowledge comes from book lore! That Patrick Henry was not so lacking as has been generally thought, in the usual requirements of education, has been fairly well established by his later investigators. Until ten years of age he was sent to a small school in the neighborhood where he made somewhat reluctant progress into the mysteries of reading, writing, and arithmetic, having special interest in the latter subject, if he could be said to have special interest in anything beside the sports of the field. He was then taken under the personal supervision of his father who had opened a grammar school in his own house, and his further education was conducted there along with the other children. In this task

his father received the very able assistance of his brother, the Reverend Patrick Henry, whose namesake our idler was and for whom he subscribed himself as Patrick Henry, junior. But for the younger who would have heard of the elder, although he was rector of St. Paul's parish in Hanover, and a classicist of no mean ability? During the five ensuing years the youth's education went forward, slowly enough doubtless, with little real discipline or system, and retarded by many interruptions for the gun and fishing-rod. At the age of fifteen, however, he had acquired some knowledge of Latin and Greek; had read Virgil and Livy in the original; and had gained a considerable knowledge of mathematics. As the years passed his mind matured and he became fond of geography, historical works generally, more particularly of the history of Greece and Rome. It is said that he was especially fascinated by Livy and that he made it a custom to read an English translation at least once every year during all the early years of his life.

"He read also; it is apparent, the history of England and of the English colonies in America, and especially of his own colony; for the latter finding, no doubt, in Beverley and in the grave and noble pages of Stith, and especially in the colonial charters given by Stith, much material for those incisive opinions which he so early formed, as to the rights of the colonies, and as to the barriers to be thrown up against the encroaching authority of the mother country."³

³ Tyler, p. 19-20.

That he also learned something of French is indicated by some sentences in that language written by him in a law book in 1760. It thus appears that he was imbued with the essential rudiments of the best intellectual culture. His masters were competent and deeply interested. The required drill in Latin was doubtless the basis of the beauty and strength of expression of which he became an unapproachable master. It is beyond dispute that from his first appearance as a public speaker until the last, he appeared not as a mere declaimer, but as an adept in language.

It is related that Patrick Henry himself told his eldest grandson, Colonel Patrick Henry Fontaine, that his uncle instructed him "not only in the catechism, but in the Greek and Latin classics." There would, therefore, seem to be little basis of reason for Thomas Jefferson to say: "I have often been astonished at his command of proper language; how he obtained the knowledge of it I never could find out, as he read little, and conversed little with educated men." Later, in 1824, Jefferson, the old man, said in speaking of his early friend: "He was a man of very little knowledge of any sort. He read nothing and had no books." We must take Jefferson's statements with more than a grain of allowance, for personal rancor as well as uncertain memory colored his opinions.

To controvert this, reference is made again to the testimony of the grandson, Colonel Fontaine, who

said that during his student days at Hampden-Sidney College, he found "his grandfather's examinations of his progress in Greek and Latin" so rigorous that he dreaded them much "more than he did his recitations to his professors."⁴

It is not maintained that Patrick Henry was, or ever became, a really bookish man, but genius has ways of its own in reaching heights denied plodders of the beaten track. Somehow, someway, during the years of his slow development he acquired a taste for the printed page, and in his maturity was a man of ideas, as well as of words. It is, however, certain that he gave no sign or token at the time of his leaving school at the age of fifteen, nor for many years afterward, of the possession of an intellectual gift which was to make him a supreme power in the stirring years of our country's early history.

The father did not discover in his son capabilities out of the ordinary for earning a livelihood. He placed Patrick, at the close of his school days, with a country merchant to be trained for business life. We have no record, but his conduct during this year must have been fairly satisfactory, for we find, the year following, that the father purchased a small stock of goods and installed Patrick and his older brother William as the shopkeepers. The business did not prosper and various reasons have been assigned for the failure, chief among them, the habits of idleness of the brothers. William, it

⁴ Tyler, p. 16.

would seem, was more indolent, if possible, than Patrick. Mr. William Wirt Henry contends that this was not the main reason, but rather the too indulgent practice of giving credit. At any rate, in a year's time the business was so embarrassed that its discontinuance became imperative. The duty of winding up affairs devolved upon Patrick, and while he was thus engaged, wholly without employment or money, he married at the mature age of eighteen. The young woman was Sarah Shelton, the daughter of a small farmer of the neighborhood, and as poor in purse and worldly wisdom as Patrick himself. The very helplessness and rashness of these foolish young paupers must have appealed to their respective parents who joined forces and placed the young couple on a small farm where, with the help of half a dozen slaves, they were expected to find support in farming. Patrick's lack of agricultural skill and aversion to systematic labor of any sort, to which was added the misfortune of an accidental fire in 1757 which destroyed his dwelling-house and much of its contents, brought this experiment to a disastrous close. He was now forced to sell some of his slaves to repair his losses, and with the balance of the proceeds he once more embarked upon the treacherous sea of mercantile life. Having failed once as a merchant, and having proven himself a bad farmer, it is difficult to understand the reasons which induced him to believe that he should improve his circumstances by leaving the

farm to try the store again. However, his situation was somewhat desperate for the needs of a growing family were daily before him and something had to be done. Neither his misfortunes nor his earlier business experience had taught him prudence, and we find his habit of granting credit unchanged. As the business was small even for a country store, and the customers willing to accept what he so willingly gave, it is not strange that this mercantile venture also resulted in failure.

“The business continued for about two years, and his cash sales footed up only £39 6s. 3d. . . . At the end of two years he found his capital gone and himself in debt, but not insolvent, as has been represented. His business had been too limited for that result, and we have his statement, late in life, that he was never sued for a debt of his own.”⁵

Surely the crisis in his affairs had come! He was now a youth of three and twenty, with a wife and children and an unbroken record of failure in every venture. Fortunately, his cheerful self-reliant spirit did not desert him, and even in this extremity he could deal gaily with the serious problems of the situation.

It was at this crisis in his fortunes, 1759, that Thomas Jefferson and Patrick Henry met during the Christmas holidays at the home of Colonel Dandridge, in Hanover. Jefferson, at this time a lad of sixteen, was on his way to the College of

⁵ Henry, vol. I, 17.

William and Mary. Many years later Mr. Jefferson gave Mr. Wirt an account of this meeting.⁶

During the festivity of the season I met him in society every day and we became well acquainted, although I was much his junior. . . . His manners had something of coarseness in them; his passion was music, dancing, and pleasantry. He excelled in the last, and it attached everyone to him. You ask some account of his mind and information at this period; but you will recollect that we were almost continually engaged in the usual revelries of the season. The occasion, perhaps, as much as his idle disposition, prevented his engaging in any conversation which might give the measure either of his mind or information. . . . Mr. Henry had, a little before, broken up his store,—or rather it had broken him up; but his misfortunes were not to be traced, either in his countenance or conduct.

Necessity now drove him to a new venture; he could not till the soil, neither could he buy and sell, but he could talk, and he had a knowledge of the human species—why not use his tongue? He had listened to the wrangling of the country lawyers; he had watched them in their appeals to juries; he had sometimes sat upon juries himself, and had learned somewhat of the lawyer's art in putting things; for he, too, could make men laugh or grow serious—why not be a lawyer? The law seemed to consist in diverting men's minds—this he had often done in social pleasantry, why not for a livelihood?

Having arrived by some such mode of reasoning or by chance at this decision, he borrowed a "Coke

⁶ Wirt, pp. 32-33; Tyler, pp. 8-9; Henry, vol. I, 18-19.

upon Littleton" and a "Digest of the Virginia Acts." By close application he was able to read them in a month or six weeks.⁷

Sometime in the early Spring of 1760, Patrick Henry rode up to Williamsburg where he again saw Thomas Jefferson and where he presented himself before the Board of Examiners asking for a license to practice the learned profession. Despite his retentive memory and ready tongue he could have known very little of law as a science, but he did know something of history, and under the uncouth exterior the learned examiners must have recognized something of latent intellectual power, which moved them, with many misgivings and much reluctance, to sign his license.

Concerning the encounter of this obscure and raw country youth with the accomplished men who examined him as to his fitness to receive a license to practice law, there are three primary narratives—two by Jefferson, and a third by Judge John Tyler. In his famous talk with Daniel Webster and the Tichnors at Monticello, in 1824, Jefferson said:

There were four examiners,—Wythe, Pendleton, Peyton Randolph, and John Randolph. Wythe and Pendleton at once rejected his application; the two Randolphs were, by his importunity, prevailed upon to sign the license; and, having obtained their

⁷ Wirt, 34. Henry, vol. I, 20. Mr. Wirt says:—"So say Mr. Jefferson and Judge Winston. Mr. Pope says nine months. Col. Meredith and Capt. Dabney, six or eight months. Judge Tyler, one month; and he adds: 'This I had from his own lips. In this time he read Coke upon Littleton, and the Virginia laws.'"

signatures, he again applied to Pendleton, and after much entreaty and many promises of future study, succeeded also in obtaining his. He then turned out for a practicing lawyer.

In a memorandum prepared nearly ten years before the conversation just mentioned, Jefferson described somewhat differently the incidents of Henry's examination:

Two of the examiners, however, Peyton and John Randolph, men of great facility of temper, signed his license with as much reluctance as their dispositions would permit them to show. Mr. Wythe absolutely refused. R. C. Nicholas refused also at first; but on repeated importunities, and promises of future reading, he signed. These facts I had afterwards from the gentlemen themselves; the two Randolphs acknowledging he was very ignorant of law, but that they perceived him to be a young man of genius, and did not doubt he would soon qualify himself.

"Long afterward, when all this anxious affair had become for Patrick Henry an amusing thing of the past, he himself, . . . seems to have related one remarkable phase of his experience to Judge John Tyler."⁸

One of the examiners was Mr. John Randolph, who was afterward the king's attorney-general for the colony—a gentleman of the most courtly elegance of person and manner, a polished wit, and a profound lawyer. At first he was so much shocked by Mr. Henry's very ungainly figure and address, that he refused to examine him. Understanding, however, that he had already obtained two signatures, he entered with manifest reluctance on the business. A very short time was sufficient

⁸ Tyler, pp. 22-25; Wirt, pp. 34-35; Henry, vol. I, 21-23.

to satisfy him of the erroneous conclusion which he had drawn from the exterior of the candidate. With evident marks of increasing surprise, . . . he continued the examination for several hours, interrogating the candidate, not on the principles of municipal law, in which he no doubt soon discovered his deficiency, but on the laws of nature and of nations, on the policy of the feudal system, and in general history, which last he found to be his stronghold. During the very short portion of the examination which was devoted to the common law, Mr. Randolph dissented, or affected to dissent, from one of Mr. Henry's answers, and called upon him to assign the reasons of his opinion. This produced an argument, and Mr. Randolph now played off on him the same arts which he himself had so often practiced on his country customers; drawing him out by questions, endeavoring to puzzle him by subtleties, assailing him with declamation, and watching continually the defensive operations of his mind. After a considerable discussion, he said, "You defend your opinions well, sir; but now to the law and to the testimony." Hereupon he carried him to his office, and, opening the authorities, said to him:

"Behold the force of natural reason! You have never seen the books, nor this principle of the law; yet you are right and I am wrong. And from the lesson which you have given me . . . I will never trust to appearances again. Mr. Henry, if your industry be only half equal to your genius, I augur that you will do well, and become an ornament and an honor to your profession."

With the precious document in his pocket Patrick Henry rode back to Hanover. He was now a man of twenty-four, who had failed in every enterprise heretofore undertaken, and who had given no evidence to any one of the extraordinary gift which was to make him immortal. Doubtless, serious thoughts of his own deficiencies as a lawyer accom-

panied this ride, and he must have resolved by study to make himself fit.

The nine years of seeming idleness and failure, between leaving school at the age of fifteen and admission to the bar at twenty-four, stumbling and blundering as they surely were, had not been without their influence upon his intellectual growth, for during this period he had learned, not perhaps to love nature less, but to find a companionship in books. In a word, he had gained a taste for reading.

Not that he was a scholar, or devoted to miscellaneous reading, but he had the basis of an education, and was fond of a few good books which he read again and again. Possessed of an excellent memory, and a type of mind which grasped the strong points of any subject, he had, also, strong, warm, human sympathies for all in distress, and a love for his fellow men which aroused his zeal for the weaker side in a conflict. With these gifts, and a readiness of speech, he stands at the threshold of the profession, the door of which was to swing wide for him and beyond whose portals he was to find unbounded influence, position, and wealth.

Mr. Wirt's account of the three years following Patrick Henry's admission to the bar, based upon information given by Jefferson, was for years accepted as accurate. Jefferson said that Patrick Henry "turned his views to the law for the acquisition or practice of which, however, he was too lazy. Whenever the courts were closed for the winter ses-

sion, he would make up a party of poor hunters of his neighborhood, would go off with them to the piney woods of Fluvanna, and pass weeks in hunting deer . . . sleeping under a tent before a fire, wearing the same shirt the whole time, and covering all the dirt of his dress with a hunting shirt. He never undertook to draw pleadings, if he could avoid it, or to manage that part of a cause. And the fee was an indispensable preliminary, observing to the applicant that he kept no accounts, never putting pen to paper, which was true.”⁹

The inaccuracy, if not the wilful falsity, of this can be proved, for since Wirt's time, Patrick Henry's fee-books, kept from the beginning to the close of his professional life, have come to light, and into the possession of Mr. William Wirt Henry of Richmond, who gives full data regarding them in his carefully prepared volumes. The first entry is for September, 1760, and from that date until 1763, the year when Patrick Henry came into great prominence by his speech in the “Parsons' Cause,” the fee-books contain record of eleven hundred and eighty-five fees in suits, besides many other fees for the drawing of legal papers out of court. These fee-books are neatly kept and show that following the celebrated “Parsons' Cause” his practice became enormous and so continued during his whole life, except during those periods when he turned clients away owing to the stress of public service or

⁹ Tyler, pp. 29-30; Henry, vol. I, 26.

broken health. It appears from the first that he acquired considerable local practice; not that it would have been particularly to his discredit had he secured little or no practice in the beginning, provided only that he qualified himself to handle practice when it came.

The fee-books clearly disprove Jefferson's last statement, and destroy the trustworthiness of the rest. It is not easy to understand how the inexperienced young lawyer could "make up a party of poor hunters and go off with them to the piney woods . . . and pass weeks in hunting . . . ," and at the same time could earn the fees charged in eleven hundred and eighty-five suits, besides preparing other legal papers, if he were "too lazy" for the "acquisition or practice" of law.

As Mr. Tyler truly and impressively says:¹⁰

Indeed, if so much legal business could have been transacted within three years and a half, by a lawyer who, besides being young and incompetent, was also extremely lazy, and greatly preferred to go off to the woods and hunt for deer while his clients were left to hunt in vain for him, it becomes an interesting question just how much legal business we ought to expect to be done by a young lawyer who was not incompetent, was not lazy, and had no inordinate fondness for deer-hunting. It happens that young Thomas Jefferson himself was just such a lawyer. He began practice exactly seven years after Patrick Henry, and at precisely the same time of life, though under external circumstances far more favorable. As a proof of his uncommon zeal and success in the profession, his biographer, Randall, cites from Jefferson's fee-books the number of cases in which he was employed until he was finally

¹⁰ Tyler, pp. 31-32.

drawn off from the law into political life. Oddly enough, for the first four years of his practice, the cases registered by Jefferson number in all but 504. It should be mentioned that this number, as it includes only Jefferson's cases in the General Court, does not indicate all the business done by him during those first four years; and yet, even with this allowance, we are left standing rather helpless before the problem presented by the fact that this competent and diligent young lawyer — whom, forsooth, the rustling leaves of the forest could never for once entice from the rustle of the leaves of his law books — did nevertheless transact, during his own first four years of practice, probably less than one half as much business as seems to have been done during a somewhat shorter space of time by our poor, ignorant, indolent, slovenly, client-shunning and forest-haunting Patrick.

These same truth-telling fee-books show that Patrick Henry had during this time a general law practice both in and out of court, a small portion of it being criminal suits, and much the larger part the ordinary suits in county litigation, and the preparation of various kinds of legal papers. That he came to the practice of law ill-prepared no one will deny; but that he soon made himself competent is established by evidence beyond dispute. Many a young man of ordinary ability has come to the bar miserably prepared who later becomes a good lawyer, and in Patrick Henry's case we are dealing not with the ordinary mind but with genius. It is not strange that he fitted himself for successful practice in a quickness of time incredible to the dolt or dullard.

For three years Patrick Henry had gained steadily in his modest law practice when he was retained in an apparently hopeless contest, in November,

1763, on the side of the people in the celebrated "Parsons' Cause," from which he emerged, as did Erskine at a later time, a personality henceforward to be reckoned with in public affairs.

To summarize the case briefly:—The Colony of Virginia had an established church, the Church of England; this was supported as any other institution of the Government by revenues derived from taxes levied on the people. The towns of the northern colonies became parishes in Virginia, and the selectmen or supervisors of the north became vestrymen here. The law conferred upon these vestrymen the duty of hiring the rector or minister and of paying him his salary from taxes levied on the people. The precise amount to be paid was fixed by law. Money was almost non-existent in the colony and tobacco became the standard of value and the medium of exchange.

As early as 1696 the salaries of the clergy of the established church had been fixed by statute at sixteen thousand pounds of tobacco, to be levied by the several vestrymen on their parishes. This act was re-enacted with amendments in 1748, and this new act having been approved by the King, became a law and could not be repealed or even suspended except by the royal approval.

At this time and for some years afterward the value of inspected tobacco was rated at two pence in the pound, or sixteen shillings and eight pence per hundred pounds.

According to the provisions of the law the clergy had the right to demand and were in the habit of receiving payment of their stipend in tobacco, unless they chose to commute it for money at the market price. The market value of the commodity fluctuated; at times the price was so low that the parson's portion yielded a sum wholly insufficient for his support. On the other hand during some years the price of tobacco rose considerably above the average, and the clergy enjoyed the advantage. In this way there had been established between vestry and clergy in their fiscal relations a sort of give-and-take policy. When tobacco was high the clergy benefited; when the price was down they were expected to bear their losses with spiritual grace. This adjustment of profit and loss had long been in force, and when the law of 1748 was passed, it probably did not occur to any one that the time would come when a majority of the people of Virginia would favor the injustice of depriving the parson of the benefit of the good years and in the bad ones leave him to starve on Pharaoh's lean kine. This, however, proved to be the case.

In 1755, the crop of tobacco having fallen short, the House of Burgesses passed "an act to enable the inhabitants of this colony to discharge their tobacco debts in money for the present year,"¹¹ by the provisions of which "all persons, from whom any tobacco was due, were authorized to pay the same

¹¹ Hening, *Statutes at Large*, vol. VI, 568, 569.

either in tobacco or money, after the rate of sixteen shillings and eight pence per hundred, at the option of the debtor." This act was to be in force for ten months and did not contain the usual clause of suspension, until it should receive the royal assent.

Whether the scarcity was really so general as to render this act a measure of obvious necessity, or whether the clergy were satisfied by its universality, including as it did, not only the clergy, but clerks, attorneys, and all tobacco-creditors, they bore their losses for this year with little murmuring. However, they must have observed the benefits derived by the rich planters, who were permitted by the act to receive from fifty to sixty shillings per hundred for their tobacco, and to pay their debts due in that article at the fixed rate of sixteen shillings eight pence per hundred.

This tried the grace of the parsons sorely, and made them less willing to submit uncomplainingly to a repetition of the act three years later, when in 1758, the legislature, fearing a short crop, re-enacted the provisions of the former law to be in force for twelve months, and as in the former act the suspending clause was omitted.¹²

The operation of this law upon the poor parson compelled him to take in payment for his year's services the sum of about £133 in paper currency, depreciated in the colony and worthless elsewhere,

¹² Hening, *Statutes at Large*, vol. VII, 240, 241.

instead of his 16,000 lbs. of tobacco, having a market value this year of about £400 sterling.

The clergy applied for a hearing when the act was before the legislature and were refused.

After the act was passed, they applied to the acting governor, asking him to disapprove the act, but they met with no favor in that quarter. Thereupon they sent one of their own number to England to solicit the royal veto of the act. The privy council after a full hearing of both sides decided that the Virginia clergy had their "certain remedy at law," and granted the royal disallowance.

When these tidings reached the Colony several of the clergy brought suits against their respective vestries to compel full payment of their salaries for 1758. The most famous of these suits was the case of the Reverend James Maury, of the parish of Frederickville, in Louisa County. He brought suit in the court of Hanover County, and the court having before it the evidence of the royal disallowance of the act of 1758, "adjudged the act to be no law."

The decision seemed simple enough; it only remained to summon a jury to determine the amount of damages sustained by the parson, which amount would consist of the difference between the money actually paid him and the value of the tobacco to which he was entitled.

The litigation was thus favorable to the clergy. It seemed that a jury would be forced to award the full amount asked, and a test case established.

The counsel for the defense regarded the cause of his clients lost and asked to withdraw from the case. At this critical juncture, with law and equity and court decision against them, the defendants in their extremity turned to Patrick Henry. He enlisted in the desperate cause and gave it whole-hearted service. The decision of the court was rendered at the November session, and the first of December fixed for the summoning of the special jury "to examine whether the plaintiff had sustained any damages, and what."

The case had excited wide-spread interest and was the subject of much discussion among the people, accordingly a large concourse gathered to listen to the arguments. Colonel John Henry was the presiding magistrate; to his right and left sat the other justices, and next to them the clergy, except Mr. Maury, who sat with his counsel. A formidable array for our young lawyer!

Mr. Peter Lyons, a leading lawyer in that part of the colony, afterward president of the Virginia Court of Appeals, opened in a brief logical statement, without warmth or prejudice, except in his conclusion when he paid tribute to the benevolence of his clients, the clergy.

Patrick Henry arose. He had made a profound study of the case; it was not a matter of mere pounds and shillings, but involved, as he felt, the dearest rights of the people as he had gathered them from the pages of English history. He began awkwardly

enough, hesitated, and all present, excepting the clergy, who thus saw their case securely won, pitied the unpromising beginning. His father on the bench dropped his eyes in confusion. These emotions were of fleeting duration, however, for as he proceeded a wonderful change came over him; he seemed transformed; the man had met the occasion, and Patrick Henry found himself. Suddenly he grew erect and commanding; his face lighted up; his eyes burned brightly; his sentences came sharp, clear, and decisive in an overwhelming torrent of eloquence. "There was but one will in that assembly, and that will was the will of Patrick Henry." The verdict of the jury was one penny damages! At twenty-seven he had made the first great speech¹³ of his life. The court-room which he had entered as an obscure young lawyer, he left as a celebrated man to take a foremost place among the leaders of Virginia in public affairs.

It is not strange that following this incident he should spring into great professional prominence, and should be regarded as the most eloquent advocate in the colony. One natural result of this astonishing forensic success was that he was immediately retained by the defendants in all similar cases then pending in the colony. His fee-books show that from that day his practice grew enormously.

Patrick Henry's first visit to Williamsburg, the

¹³ For a full account of this speech as it impressed his contemporaries, see Wirt, pp. 42-45; or Tyler, pp. 48-52.

capital of the colony, was in 1760, to ask permission to practice law; his second in 1764 to appear for Dandridge in his contest with Littlepage over a seat in the legislature; his third in May, 1765, when he appears as a member of the House. Here he immediately gained a position of political supremacy, for before the 1st of June he had aroused the political animosity and envious opposition of the aristocratic leaders, and had "contrived to do two or three quite notable things—things, in fact, so notable that they conveyed to the people of Virginia the tidings of the advent among them of a great political leader, gave an historic impulse to the series of measures which ended in the disruption of the British empire, and set his own name a ringing through the world,—not without lively imputations of treason, and comforting assurances that he was destined to be hanged."¹⁴

In 1764 tidings had reached Virginia that the British ministry intended to pass at its next session an act imposing stamp duties on the American colonies. In response to these tidings the House of Burgesses in the fall of 1764 sent to the British government a respectful message, elaborately drawn, protesting that the loving and loyal Virginians looked upon this as a violation of their ancient constitutional rights. This remonstrance was framed by men of political prominence and high social standing.¹⁵

¹⁴ Tyler, pp. 62-63.

¹⁵ This committee included in its members, Landon Carter, Richard

The only answer received was a copy of the Stamp Act itself in May, 1765, about the time Patrick Henry took his seat. England sent it now not as a suggestion, but as a law, and this put an entirely different phase upon the whole matter. The conservative leaders felt that deliberate, careful, and united action upon the part of all the colonies should be agreed upon before any one colony should adopt a policy. The new member thought differently. We can imagine the amazement, not unmixed with disgust, with which these leaders now saw the floor taken by this fledgling from the county of Louisa; this rude and untrained stripling of the fiery tongue.

They were not long in doubt as to his purpose in rising, for he moved a series of resolutions¹⁶ which he read from the blank leaf of an old law book,—resolutions so revolutionary that the Assembly was aghast. Violent and acrimonious debate followed in which denunciation, abuse, logic, and learning were hurled against him, but almost unaided, he met and defeated his adversaries.

It was during this epoch-making debate that the familiar dramatic scene occurred in which, rising to the great climax, he said: "Cæsar had his Brutus; Charles the First, his Cromwell; and George the Third"—interrupted by the cry of "treason" from all sides, he paused in proud defiance until the tumult

Henry Lee, George Wythe, Edmund Pendleton, Benjamin Harrison, Richard Bland, and Peyton Randolph.

¹⁶ The famous Virginia Resolutions appear in full in Tyler, 69-71, and the discussion of them, pp. 75-76.

subsided, and closed thus: "and George the Third may profit by their example. If this be treason, make the most of it."

Mr. Wirt declares that, "after this debate there was no longer a question among the body of the people as to Mr. Henry's being the first statesman" as well as the first "orator in Virginia."

Following this term in the House of Burgesses in 1765, we have a period of nine years before the opening of the first Continental Congress in 1774, and during this time Mr. Henry advanced steadily both as a lawyer and a politician. In the first five years of his professional life it may be said that he leaped from obscurity to fame; he enters now upon this second period, a recognized leader, having a career solidly established. The earlier years of this period were most favorable to his professional growth, for while the political questions were exciting they had not yet reached the point where they demanded complete surrender of time.

The fee-books ¹⁷ for these years record Mr. Henry's success and industry as a lawyer. They show much

¹⁷ Mr. William Wirt Henry says: "In 1764 he charged five hundred and fifty-five fees; in 1765 five hundred and fifty-seven; in 1766 when the colony was under great political excitement, his fees fell off to one hundred and fourteen; in 1767 they reached five hundred and fifty-four; and then the renewal of the trouble with England reduced his business until finally in 1774, the courts were closed. Thus he charged in 1769 one hundred and thirty-two fees; in 1770 ninety-four; in 1771 one hundred and two; in 1772 forty-three; in 1773 seven; and in 1774 none. The fees in criminal cases were not noted on these books, and were additional."

professional activity, and growth in reputation, especially in cases dealing with the higher and more difficult branches of the law.

Prior to 1769 his practice had been limited to the courts of the several counties, but in that year he came to the bar of the General Court, the highest court in the colony, where the most difficult and important cases were tried and where he entered into competition with the most learned and distinguished lawyers of the day, some of whom had been educated at the Temple.¹⁸

After coming to the bar of the General Court he added to his reputation as a lawyer by his appearance in a case in admiralty as counsel for the captain of a Spanish vessel, which, with its cargo, had been libelled under the oppressive Navigation Act. After the trial, William Nelson, one of the Court, declared that he had never heard a more eloquent or argumentative speech than Mr. Henry's; that he considered him greatly superior to Mr. Pendleton, Mr. Mason, or any other counsel who argued the cause, and that he was astonished to find him so thoroughly familiar with maritime law, to which he believed he had never paid any attention before.¹⁹

In 1773²⁰ Mr. Robert Carter Nicholas, "who had

¹⁸ Among the lawyers then practicing at the Virginia bar, were Wythe, Pendleton, John Randolph, Thompson Mason, Robert C. Nicholas, Mercer, Blair, and Jefferson.

¹⁹ Henry, vol. I, 124.

²⁰ 1773 is the date given by Mr. William Wirt Henry; Mr. Tyler says 1771.

himself enjoyed the first practice at the bar," gave testimonial of his confidence in Patrick Henry's qualifications and attainments as a lawyer, by a public advertisement informing his clients that he had turned over his unfinished business and committed their further interests to Patrick Henry. This would seem to be conclusive evidence that Mr. Henry's professional brethren thought highly of him.

Although Mr. Henry advanced to the foremost rank in his profession, his practice including many important cases, turning on propositions of law argued before the highest tribunals, it is a fact that he was most distinguished and most sought after in jury trials. Actions to be tried before juries must have constituted the larger part of the practice to be had in Virginia at that time, and as Patrick Henry's power to move people was well recognized, it is not strange that he became heralded abroad as the ablest defender of criminals in Virginia. Mr. Wirt says:

He understood the human character so perfectly; knew so well all its strength and all its weaknesses, together with every path and by-way which winds around the citadel of the best fortified heart and mind, that he never failed to take them, either by stratagem or storm.

During these years in which he was building his law practice on a safe foundation, he also kept in close touch with political life. He was sent to every session of the House of Burgesses; was prominent

in local committees and conventions; a member of the first Committee of Correspondence; and was also one of the delegates from Virginia to the first Continental Congress.

Of the personnel of this body Lord Chatham said: " . . . that for solidity of reasoning, force of sagacity, and wisdom of conclusion under such a complication of difficult circumstances no nation, or body of men, can stand in preference to the general Congress at Philadelphia . . . all attempts to impose servitude upon such men, to establish despotism over such a mighty continental nation, must be vain, must be fatal." ²¹

And Lord Camden is reported to have said: . . . "he would have given half his fortune to have been a member of that which he believed to be the most virtuous public body of men which ever had or ever would meet together in this world."

When we recall that the members of this remarkable assembly were together for more than seven weeks in the closest intellectual sympathy, it becomes certain that no mere babbler, however eloquent, could have joined in debate with this body of the ablest men in America without losing every atom of their intellectual respect and without exposing his own intellectual barrenness. As it turns out these men carried home the report that Patrick Henry was "a man of extraordinary intelligence, integrity, and power."

²¹ Henry, vol. I, 244.

He formed warm personal attachment to a number of the members; especially was he attracted by the stirring patriotism of John and Samuel Adams. Years later, John Adams, who did not frequently indulge in extravagant praise of others, wrote to Jefferson that "in the Congress of 1774 there was not one member, except Patrick Henry, who appeared . . . sensible of the precipice, or rather the pinnacle, on which we stood, and had candor and courage enough to acknowledge it." ²²

This same unemotional statesman told Mr. Wirt that Patrick Henry always impressed him as a man of "deep reflection, keen sagacity, clear foresight, daring enterprise, inflexible intrepidity, and untainted integrity, with an ardent zeal for the liberties, the honor, and the felicity of his country and his species." ²³

The first two days of the Congress were occupied with the details of organization; Patrick Henry is reported to have spoken three times during this extended debate and at the close two leading committees were appointed; one, "to state the rights of the colonies"; the other, "to examine and report the several statutes which affect the trade and manufactures of the colonies." Patrick Henry represented Virginia on this second committee. His selection indicates that he had exhibited qualities both lawyer-like and business-like, and that he impressed his

²² Works of John Adams, vol. X, 78.

²³ Works of John Adams, vol. X, 277.

sober-minded fellows as a man of affairs. His name was added to the first committee about two weeks later. Besides bearing his share in the serious deliberations of this august body, he relieved the tedium of the days by flashes of his unrivalled gift.

Patrick Henry's discriminating judgment of men is illustrated by the following: ²⁴

When returned to his home he was asked by a neighbor who he thought was the greatest man in Congress. He answered, "Rutledge, if you speak of eloquence, is by far the greatest orator, but Col. Washington, who had no pretensions to eloquence, is a man of more solid judgment and information than any man on the floor." As he looked upon Mr. John Rutledge's views with dislike, and Colonel Washington's modesty kept him in the background, so that he had not been placed upon a single committee, this reply indicates not only the great discrimination, but the justice of Mr. Henry in judging men, whether friends or opponents.

March 20, 1775, the second Virginia convention met in St. John's Church, Richmond; organized by electing Peyton Randolph president, and immediately considered the proceedings of the Continental Congress. These they heartily approved and returned to their "worthy delegates" the "warmest thanks" "for their cheerful undertaking and faithful discharge of the very important trust reposed in them." ²⁵

Patrick Henry was at once the most picturesque

²⁴ Henry, vol. I, 247.

²⁵ Wirt, p. 134.

figure and the most revolutionary statesman in this assembly. He had a bolder grasp of the situation, and seemed to realize better than any of his compeers that the time for parley with Great Britain was past, and that the time for bold, decisive action on the part of the colonies had come.

Nearly fifty years later, Jefferson, who was also a member of this convention, gave this grudging meed of praise:²⁶

After all it must be allowed that he was our leader in the measures of the Revolution in Virginia, and in that respect more is due to him than to any other person. . . . He left all of us far behind.

A series of resolutions²⁷ were presented urging upon the people of Virginia that they should treat all further talk of peace with Great Britain as hopeless; that they should recognize that they were virtually at war with the mother country; and that they should take measures at once to prepare for defence. Supporting these resolutions Patrick Henry made the speech,²⁸ perhaps the most celebrated of all speeches in the annals of revolutionary eloquence. It is treasured in the memory, at once the joy and despair of every youthful orator since. It was in this speech that he exclaimed: "Give me liberty, or give

²⁶ Curtis' *Life of Webster*, vol. I, 258; Tyler, p. 139.

²⁷ Henry, vol. I, 257-258; Tyler, pp. 134-135.

²⁸ It is unfortunate that no unquestioned report of this speech has come down to us, but a full discussion of it and of its effect upon his hearers will be found in, Henry, vol. I, 259-271; Tyler, pp. 140-151; and Wirt, pp. 137-142.

me death." The cry swept like a firebrand through the colonies and added unquenchable fuel to the fire of freedom.

In Patrick Henry's permanent fame as a statesman and orator, his activity and prominence as a soldier in the early days of the Revolution have been well-nigh forgotten. Jefferson says the "first overt act of war" in Virginia was committed by Captain Patrick Henry. It consisted in his forming and marching at the head of a volunteer company upon Williamsburg to demand the return of powder which the royal governor, Lord Dunmore, had surreptitiously removed from the public magazine at Williamsburg, and placed in the armed schooner *Magdalen*, then lying in the James River. The prudent and conservative shook their heads and begged him to desist; he persevered and succeeded. The chief command of the first organization of the Revolutionary army in Virginia was given to him, but he was not permitted to show whether he had gifts as a military leader, for after some months of nominal command, he was forced by a series of official slights to resign. He took his seat as a member of the second Continental Congress on the 18th of May and remained until the close of the session, August 1st. As the proceedings were transacted in secret, and the official journal makes no mention of individual participation in debate, it is difficult to estimate the influence exerted by any member. However, from the record of service in the form of committee work it is easy

to see that he bore his share of the burden and heat of the day. Mr. Tyler says: ²⁹

Further it will be noted that the committee-work to which he was thus assigned was often of the homeliest and most prosaic kind, calling not for declamatory gifts, but for common sense, discrimination, experience, and knowledge of men and things.

We pass now to the Virginia Convention which convened the 6th of May, 1776, and lasted two months, and we find Patrick Henry again bearing a large part of the drudgery and serving on many important committees.³⁰ Contemporaneous opinion evidently considered him not simply a leader in debate, but a constitutional lawyer and a capable business man.

²⁹ Tyler, p. 172.

³⁰ The journal indicates that he was a member of the following committees: (1) privileges and elections; (2) to bring in an ordinance to encourage the making of salt, saltpetre, and gunpowder; (3) propositions and grievances; (4) to inquire for a proper hospital for the reception and accommodation of sick and wounded soldiers; (5) to inquire into the complaint made by the Indians respecting encroachments on their lands; (6) to bring in an ordinance for augmenting the ninth regiment, for enlisting four troops of horse, and for raising men for the defence of the frontier counties; (7) to inquire into the causes for the depreciation of paper money in the colony, and into the rates at which goods are sold at the public stores; (8) to prepare an address to be sent by Virginia to the Shawanese Indians; (9) to bring in amendments to the ordinance prescribing a mode of punishment for the enemies of America in this colony; (10) to prepare an ordinance "for enabling the present magistrates to continue the administration of justice, and for settling the general mode of proceedings in criminal and other cases;" (11) "to prepare a declaration of rights and such a plan of government as will be most likely to maintain peace and order in this colony, and secure substantial and equal liberty to the people."

It is of interest to note here that before the Continental Congress had taken its final vote upon the question of independence, this Virginia convention had declared independence, formed her constitution and elected her executive. This executive was Patrick Henry, who took the oath of office as governor of Virginia on July 5th, 1776, the day the convention adjourned. He was ill following the adjournment and was not able to assume the duties of his office until the 17th of September. Indeed, during the remaining twenty-three years of his life he seems never to have been in robust health.

The governor's salary was fixed at £1,000 sterling for the year and he was invited to occupy the palace at Williamsburg, which had been vacant since the flight of Lord Dunmore. By a sort of romantic justice he was the immediate successor in the mansion of state of the Royal Governor, who only fourteen months before had contemptuously referred to him in a public proclamation as "a certain Patrick Henry of Hanover County." One thousand pounds was appropriated for additional furnishing of the palace.

As was natural to one whose early life had been so far removed from the conventions of society, he was careless and indifferent in matters of dress, often presenting a rude and uncouth appearance. His adaptability, however, to circumstance and position is well shown by the following:³¹

³¹ Tyler, pp. 219-220.

The people of Virginia had been accustomed, for more than a century, to look upon their governors as personages of very great dignity. Several of those governors had been connected with the English peerage; all had served in Virginia in a vice-regal capacity; many had lived there in a sort of vice-regal pomp and magnificence. It is not to be supposed that Governor Henry would be able or willing to assume so much state and grandeur as his predecessors had done; and yet he felt, and the people of Virginia felt, that in the transition from royal to republican forms the dignity of that office should not be allowed to decline in any important particular. Moreover as a contemporary observer mentions, Patrick Henry had been "accused by the big-wigs of former times as being a coarse and common man, and utterly destitute of dignity; and perhaps he wished to show them that they were mistaken." At any rate, by the testimony of all, he seems to have displayed his usual judgment and skill in adapting himself to the requirements of his position; and, while never losing his gentleness and his simplicity of manner, to have borne himself as the impersonation, for the time being, of the executive authority of a great and proud commonwealth. He ceased to appear frequently upon the streets; and whenever he did appear he was carefully arrayed in a dressed wig, in black small-clothes, and in a scarlet cloak; and his presence and demeanor were such as to sustain in the popular mind, the traditional aspect for his high office.

And afterward in the many positions of trust and honor which came to him, he conformed to the amenities, keeping himself above the criticism of the most fastidious.

The Executive Journal for Governor Henry's first term, exclusive of the letters written, covers four hundred and twenty-four large folio pages. The great amount of routine work accomplished shows

upon his part a clear conception of the practical needs of his people during these critical months. So entirely had he fulfilled all expectations, that at the close of his first term no one was named in opposition to him, and he was reappointed governor by joint resolution of both houses without ballot.

The demands of official business during the second term must have equalled those of the previous year. Great pressure was put upon Virginia both for men and supplies. She had a prominent position among the states, and her location saved her from the most formidable attacks of the enemy. To satisfy the demands made, or to explain the failure to do so, involved laborious correspondence on the part of the governor. Not only must he keep his own state officials informed, but also the board of war, the general of the army, and the president of Congress.

Both Tyler and Henry bear witness to his activity:

The official letters which he thus wrote are a monument of his ardor and energy as a war governor, his attention to details, his broad practical sense, his hopefulness and patience under galling disappointments and defeats.³²

Among the acts of the Assembly during Governor Henry's second term which should be noticed, were those for sequestrating British property and enabling Virginia debtors to pay their dues to British creditors into the State Treasury; for establishing a high court of chancery and a general court, and for ratifying the articles of confederation.³³

³² Tyler, p. 242.

³³ Henry, vol. I, 617.

So faithful had he been to the trust reposed in him and so admirably had he conducted the affairs of state, that at the expiration of his second term he was again unanimously chosen to succeed himself. The Executive Journal gives trustworthy evidence of his executive ability as governor; his intimate associates, the members of the Virginia legislature, testify to their confidence and satisfaction by electing him again and again, without a dissenting vote, to the highest executive position; and General Washington addresses to him during this period several letters expressive of appreciation, commending his "zeal and vigor."

Although the Constitution limited the governorship to three consecutive terms, yet a strong desire existed to re-elect Mr. Henry for the fourth time; the contention being that as his first election was by delegates who were themselves not elected under the Constitution, this should not be counted as one of the constitutional years of service. Mr. Henry, entertaining a scrupulous regard for the spirit of the law, cut short all discussion by a letter to the House of Delegates saying that as his term would expire in four or five days, and as he would then retire from office, he desired them to name his successor. The Assembly then voted upon a successor and Thomas Jefferson was elected by a close vote. The same day they passed a unanimous resolution of thanks to the retiring governor, commending the faithful discharge of his duties. Thus his administration closed

in honor and popularity. About a fortnight later he was chosen by the General Assembly as a delegate to Congress. This, however, he declined, and never afterward, in spite of the many entreaties, consented to serve in any public capacity outside of his own state.

Mr. Henry's wife Sarah died during the year of the first Continental Congress. During his second term as governor he married Dorothea, daughter of Nathaniel W. Dandridge, and granddaughter of the old royal governor, Alexander Spotswood. There were six children by his first marriage and eleven by his second marriage.

While in the office of governor he had sold his estate in Hanover County, and purchased a large tract of land in the new county of Henry. To the new estate, called Leatherwood, he removed with his family in 1779, intending to resume the practice of law. The storm and stress of public life had not only drawn largely upon his physical powers, but had depleted his purse as well. The necessary expense of living in a manner befitting the high office of governor had more than consumed his salary. For some months after his removal to this distant and mountainous solitude he lived in undisturbed seclusion, seeking to regain his health which had been sadly shattered. His interest, however, in the welfare of his commonwealth continued keen, and we find him a member of the next General Assembly, although he had, in a letter to Jefferson, expressed

his fears that his health would not permit him to "remain below long enough to serve in the Assembly," adding that he would, "however, make the trial." He did, and from the moment of his appearance he was the recipient of every honor and responsibility. The prestige of his name and his undisputed genius for leadership made him almost dictator in every matter in which he chose to express himself. His value as a working member, and his reputation for practical ability and industry, are shown by his appointment upon committees where drudgery was the chief requisite. Unfortunately, his fears regarding his health were well founded, and he was obliged to ask the privilege of withdrawing, after a little more than a fortnight's service. At the autumn session he was once more in his place doing his full share, and this in spite of ill-health, which made continuous service impossible, is the record in the various sessions of the Assembly until November, 1784, when he was again called upon by his state to occupy the chair of the Chief Executive.

During these years of legislative service Patrick Henry had occasion not only to deal with a multitude of issues, local and temporary in their nature, but in addition dealt with most of the larger problems which confronted the American people during the period of the war and the first years of peace. His position on some of these questions is most interesting. Take, for instance, the large number of Americans known contemptuously as Tories. What

treatment was to be accorded them? Were the many in exile to be allowed to return? Should those still in this country be permitted to remain? In the state of public opinion at this time it was a risky thing to raise one's voice in their favor. This is what Patrick Henry's unflinching courage enabled him to do. He had denounced them roundly while the war lasted, but now that the war was over, "no man, excepting perhaps Alexander Hamilton, was so prompt and so energetic in urging that all animosities of the war should be laid aside, and that a policy of magnanimous forbearance should be pursued respecting these baffled opponents of American independence. It was in this spirit that as soon as possible after the cessation of hostilities, he introduced a bill for the repeal of an act 'to prohibit intercourse with, and the admission of British subjects into' Virginia,—language well understood to refer to the Tories."⁸⁴ He supported the bill on the ground of national policy. A great nation could not be built on principles alone; it must have people; the time had come to lay aside personal resentment and private wrongs. He closed his appeal with this burst of indignant contempt: "Shall we, who have laid the proud British lion at our feet, now be afraid of his whelps?"⁸⁵

In the same spirit he dealt with the restraints on British commerce imposed during the war,—a question similar to the one just mentioned, at least in this

⁸⁴ Tyler, pp. 289-290.

⁸⁵ Tyler, p. 291.

particular, that it was enveloped in the angry prejudices born of the conflict just ended.

Concerning his efforts while governor to reform the criminal law, Mr. W. W. Henry contributes the following: ⁸⁶

In Virginia the harsh criminal law of England had been continued whereby the death penalty was imposed for many felonies, regardless of the grade of the crime. This was abhorrent to the nature as it was inconsistent with the reason of Governor Henry. He thereupon fell upon the plan of granting pardons when the crimes were not heinous, upon condition that the convict be subjected to hard labor for a designated period. His letter to Charles Pearson, the officer of the city of Richmond, who was to take charge of some so pardoned, shows the heart of a genuine philanthropist in his direction as to their treatment, and especially in the provision for their attendance on Divine service. It is clear that the Governor's design was to affect the reformation of the criminals so treated. This action of Governor Henry was tested in the Court of Appeals, and it was determined by that tribunal that the condition was void, and the pardon absolute. The legislature of 1785 was then sitting, and an act was at once passed authorizing the Executive to grant such conditional pardons, except in cases of murder or treason. From this humane and proper movement of Governor Henry came the penitentiary system of the State which was adopted in 1796.

He served as governor for two years, declining the honor, which was eagerly offered to him, of re-election in 1786. He wished to retire to private life, and most of all to resume the practice of law which had been, by the sacrifice of self to the public good,

⁸⁶ Henry, vol. II, 272.

interrupted for a period of more than twelve years. The close of this period, rich in the wealth of public honor and influence, found him poor and in debt, with the necessity upon him of setting about to repair his private fortunes. That he might the more easily do this, he gave up his remote home at Leatherwood, and settled in Prince Edward County, a location nearer the capital and much better adapted to the convenience of an active practitioner in the courts. Here we find him at the age of fifty, in frail health, prematurely old from the conflict of unquiet years, pluckily beginning life over again that he might provide for the honor and welfare of his large family, and for his own declining years. His professional armor, grown rusty from long disuse, he grimly buckled on again, and manfully bent himself to his task.

When the word went forth in 1786 that Patrick Henry was ready once more to receive clients, it excited attention in all parts of Virginia among those who had important cases in litigation; clients sought him eagerly, offering him large fees to argue their causes. He accepted only such cases as were worth his attention; required the employment of associate counsel to prepare the cases for trial, and confined himself to his function as an advocate. It is interesting to note the frequency with which John Marshall, later the great chief justice, appears as the associate and junior counsel. His powers as an advocate were widely recognized and he was speedily called to ap-

pear in important cases in the courts in all parts of the state. "His wonderful powers as an advocate made him especially great in *nisi prius* practice, but he was also retained in important chancery causes, and some of his greatest triumphs were in arguments addressed to judges on questions of law."³⁷

It is unnecessary to follow him in his opposition to the Constitution, which was as mistaken as it was heartfelt and sincere, or to depict the career of the veteran and eloquent advocate in his triumphal progress from court-house to court-house, or to give the details of the many causes in which he appeared, but it is a pleasure to be able to record that his untiring energy received abundant reward and that in 1794, exactly eight years after he set himself to his strenuous task, he was able to retire in comfort and wealth, freed from all public and professional employment.

The most difficult and important case from a legal point of view, in which he appeared during his entire career, is the one known as the British Debts case.³⁸ It was argued by him in the Circuit Court of the United States at Richmond in 1791 and again in 1793. The magnitude of this case consisted not so much in the large sums of money involved, but chiefly in the principles of law discussed. The treaty with Great Britain in 1783 empowered British subjects "to recover debts previously contracted to

³⁷ Henry, vol. II, 464-465.

³⁸ *Ware vs. Hylton*, 3 Dallas's Reports, 199, as finally decided in the Supreme Court of the United States adverse to the contentions of Henry and Marshall.

them by our citizens, notwithstanding a payment of the debt into a state treasury had been made during the war, under the authority of a state law of sequestration."

No sooner was the Federal Court opened in Richmond in 1790 than a number of suits were instituted by British creditors for the recovery of debts contracted before the Revolution by Virginia debtors. These had been in whole or in part paid into the state treasury under the confiscation acts (for which Patrick Henry as governor was responsible), and the real question was "whether payment of a debt due before the war of the Revolution, from a citizen of Virginia to British subjects, into the loan office of Virginia, pursuant to a law of that state, discharged the debtor."

The defendants made common cause and employed Patrick Henry, John Marshall, Alexander Campbell, and James Innes. The case involved many subtle and difficult points of law, municipal, national, and international. It involved the sovereignty of the state after the Declaration of Independence; the honor of the state in her confiscation acts; the validity of these acts under the law of nations; the effect of the treaty with Great Britain upon them; and the effect upon the treaty of England's infraction of it. The importance of the case is attested by Mr. Wirt's assertion that "the whole power of the Bar of Virginia was embarked" in it, and that the "learning, argument, and eloquence" exhibited

in the discussion were such "as to have placed that bar, in the estimation of the federal judges, . . . above all others in the United States." In 1791 the case was argued before Judges Johnson and Blair of the Supreme Court, and Griffin, district judge; in 1793, before Chief-Justice Jay, Judge Iredell of the Supreme Court, and the same district judge. For several weeks before the case was called for trial in 1791, Patrick Henry gave up all other engagements, and in the quiet of his country home settled himself to intense and absorbing study of the principles of law involved. His grandson, Patrick Henry Fontaine, who was there as a student of law, relates that he was sent by his grandfather on a journey of sixty miles to secure a copy of Vattel's "Law of Nations." From this and other works on international law, Mr. Henry "made many quotations; and with a whole syllabus of notes and heads of arguments, he filled a manuscript volume more than an inch thick and closely written." All this preparation was not without result, for Mr. Wirt, who was himself an eminent lawyer, says that Patrick Henry "came forth, on this occasion, a perfect master of every principle of law, national and municipal, which touched the subject of investigation in the most distant point." Even Jefferson, who as we have seen was far from partial, gave this grudging praise: "I believe he never distinguished himself so much as on the question of British debts. . . . He had exerted a degree of industry in that case totally foreign to his

character, and not only seemed, but had made himself really, learned on the subject."

Mr. Tyler says: ³⁹

In the spring of 1793 . . . there was the same eagerness to hear Patrick Henry as before, an eagerness which was shared in by the two visiting judges, as is indicated in part by a letter from Judge Iredell, who . . . wrote to his wife: "We began on the great British causes . . . and are now in the midst of them. The great Patrick Henry is to speak to-day." Among the throng of people who then poured into the court-room was John Randolph of Roanoke He described the orator as "old, very much wrapped up, and resting his head on the bar." Meanwhile the Chief Justice, who, in earlier days, had often heard Henry in the Continental Congress, told Iredell that that feeble old gentleman in mufflers, with his head bowed wearily down upon the bar, was "the greatest of orators." Iredell doubted it; and, becoming impatient to hear him, they requested him to proceed with his argument, before he had intended to speak. . . . As he arose, he began to complain that it was a hardship, too great, to put the laboring oar into the hands of a decrepit old man, trembling, with one foot in the grave, weak in his best days, and far inferior to the able associate by him. Randolph then gave an outline of his progress through the earlier and somewhat tentative stages of his speech, comparing his movement to the exercise "of a first-rate, four-mile, race-horse, sometimes displaying his whole power and speed, for a few leaps, and then taking up again." "At last," according to Randolph, the orator "got up to full speed," and took a rapid view of what England had done, when she had been successful in arms; and what would have been our own fate, had we been unsuccessful. The color began to come and go in the face of the chief justice; while Iredell sat with his eyes and mouth stretched open, in perfect wonder. Fi-

³⁹ Tyler, pp. 364-366.

nally, Henry arrived at his utmost height and grandeur. He raised his hands in one of his grand and solemn pauses . . . There was a tumultuous burst of applause; and Judge Iredell exclaimed, "Gracious God: he is an orator indeed!"

As examples of forensic eloquence on a great subject, before a great and fit assemblage, his several speeches in the case of the British Debts were, according to all the testimony, of the highest order of merit. What they were as examples of legal learning and of legal argumentation, may be left for any lawyer to judge for himself, by reading, if he pleases, the copious extracts which have been preserved from the stenographic reports of these speeches, as taken by Robertson. Even from that point of view, they appear not to have suffered by comparison with the efforts made, in that cause, on the same side, by John Marshall himself. No inconsiderable portion of his auditors were members of the bar; and those keen and competent critics are said to have acknowledged themselves as impressed "not less by the matter than the manner of his speeches."

Mr. William Wirt Henry says: ⁴⁰

It was the magnificent appearance of Mr. Henry in this great cause, heard at the capital of the State, that silenced those who had doubted his acquirements as a lawyer, and caused Washington to offer him afterward the position of Chief Justice of the United States.

He had not, however, in these fervid years in which he was sturdily and successfully carrying forward his private fortunes, abated, in the least, his interest in the welfare of either his state or country. He had remained a great party leader, and, as it might almost appear, had devoted every power of

⁴⁰ Henry, vol. II, 476.

body and mind to the absorbing subject of the American Constitution.⁴¹

Patrick Henry is described by his son-in-law, Judge Spencer Roane, as: "a man of middling stature. He was rather stoop-shouldered (after I knew him), probably the effect of age. He had no superfluous flesh; his features were distinctly marked, and his complexion rather dark. He was somewhat bald, and always wore a wig in public. He was not a handsome man, but his countenance was agreeable and full of intelligence and interest. He had a fine blue eye, and an excellent set of teeth, which with the aid of a mouth sufficiently wide, enabled him to articulate very distinctly. His voice was strong, harmonious, and clear, and he could modulate it at pleasure."⁴²

The portrait of Patrick Henry by Thomas Sully was made after a miniature by a French artist who was present at the trial of the British Debts case in 1791, and who studied Mr. Henry as he spoke. Later Mr. Sully used this miniature as the basis of his portrait, making some slight alterations in the wig, suggested by Chief-Justice Marshall. It represents Mr. Henry with spectacles on the top of his head. This must have been very characteristic, as the following, by one who was also present at the trial,

⁴¹ Patrick Henry's relation to the great national movement which produced the Constitution and its first ten amendments is ably discussed by Mr. Tyler in chapters 17, 18 and 19; also by Mr. Henry, vol. II, chapters 35 to 40.

⁴² Henry, vol. II, 345.

would indicate: "If the answer he was about to give was a short one, he would give it without removing his spectacles from his nose—but if he was ever seen to give his spectacles a cant to the top of his wig, it was a declaration of war, and his adversaries must stand clear." ⁴³

In 1794, the year following his last appearance in this celebrated case, Patrick Henry, possessed now of competence, withdrew from active life, to spend his remaining years quietly in retirement. The storm and stress of life had weakened his vigor and made him an old man at fifty-eight.

He settled himself and family in 1795 in the county of Charlotte on an estate called Red Hill, which continued to be his home and where he found his burial place.

The impression we gain of his life at Red Hill is a singularly pleasant one; that of a charming, hospitable Virginia home, where he gave himself up to the simple enjoyments of domestic life. However, its quiet serenity was not altogether undisturbed, for he was not willingly permitted to drop out of the larger life in which he had played his part. He received many flattering and urgent requests to leave his retreat and take a part again in solving the country's problems, but he steadily declined to be lured forth.

In 1794, General Henry Lee, then governor of Virginia, appointed Patrick Henry as a senator of

⁴³ Wirt, p. 381.

the United States to fill out an unexpired term. This honor Mr. Henry felt obliged to decline.

This same year, Washington offered him the mission to Spain, a position which Mr. Henry would gladly have accepted, but for the consciousness of failing health, and the necessity of putting his personal affairs in order. This offer was a just recognition of Mr. Henry's policy regarding the free navigation of the Mississippi, the necessity of which he had so early recognized and so long and persistently urged.

Washington, in 1795, gave further evidence not only of his cordial friendship, but of his confidence in Patrick Henry as a statesman by inviting him to become a member of his cabinet in the most important position, that of secretary of state. While Mr. Henry was not insensible of the honor thus conferred, he declined this proposal.

Three months later, Washington gave overwhelming proof of Patrick Henry's high standing in his profession as a great and profound if not a learned lawyer, by asking him to accept the highest judicial appointment in his gift, that of chief-justice of the Supreme Court of the United States. This was a tribute to a great lawyer as well as a brilliant advocate, but again he declined.

In the last year of Mr. Henry's life, 1799, President John Adams asked him to be one of three "envoys extraordinary and ministers plenipotentiary to the French republic, with full powers to discuss

and settle, by a treaty, all controversies between the United States and France."

Mr. Henry replies: ⁴⁴

My advanced age and increasing debility compel me to abandon every idea of serving my country where the scene of operation is far distant, and her interests call for incessant and long continued exertion. . . . I cannot, however, forbear expressing, on this occasion, the high sense I entertain of the honor done me by the President and Senate in the appointment. . . . nothing short of an absolute necessity could induce me to withhold my little aid from an administration whose ability, patriotism and virtue deserve the gratitude and reverence of all their fellow citizens.

In the autumn of 1796 the Assembly of Virginia elected Patrick Henry to the governorship. The opportunity of serving as governor of his state for a sixth time could not have been a great temptation to the man, whose purpose to decline public office had been proof against the allurements of the United States Senate; the highest place in Washington's cabinet, and the most distinguished judicial position in the country. He therefore declined.

It is most interesting to record that the man who could withstand the attractions of these coveted positions, yielded to the appeal of duty as presented by Washington in a long and "confidential" letter, ⁴⁵ written from Mt. Vernon on the 15th of January, 1799. Washington besought Patrick Henry to come

⁴⁴ Tyler, p. 412.

⁴⁵ Tyler, pp. 413-414; Henry, vol. II, 601-604.

before the people as a candidate for the General Assembly, that he might use his powerful influence to check the dangerous sentiments which seemed to be leading Virginia to violent action, and threatened the republic with civil war.

Responding to this solemn call, the aged statesman came reluctantly from his retreat and offered himself for the suffrages of the people. The word went round that old Patrick Henry, whose magic voice had been silent for years, was to speak as in former times and counsel the people against the threatening dangers.

“ He was very infirm, and seated in a chair conversing with some old friends, waiting for the assembling of the immense multitudes who were pouring in from the surrounding country to hear him. At length he arose with difficulty, and stood somewhat bowed with age and weakness. His face was almost colorless. His countenance was careworn; and when he commenced his exordium, his voice was slightly cracked and tremulous. But in a few moments a wonderful transformation of the whole man occurred, as he warmed with his theme. He stood erect; his eye beamed with a light that was almost supernatural; his features glowed with the hue and fire of youth; and his voice rang clear and melodious . . . and fell distinctly and delightfully upon the ears of the most distant of the thousands gathered before him.” ⁴⁶

They who had heard him that day “had heard an immortal orator who would never speak again.” ⁴⁷

He returned home to Red Hill exhausted, and al-

⁴⁶ Tyler, p. 416.

⁴⁷ Tyler, p. 421; from Henry Adams.

though elected by a handsome majority, was never afterwards able to appear in public.

It is most unfortunate that Mr. Wirt, who relied so largely upon Thomas Jefferson for his materials, created a traditional Patrick Henry who was far from the true one, as later investigations have proven. It is certain that no mere declaimer could have received the signal expressions of confidence and regard which were so freely bestowed upon Patrick Henry by his contemporaries had oratory been his only gift. The opinion of the great chief-justice, John Marshall, is certainly of weight, and when he was asked his opinion of Wirt's "Life of Patrick Henry," first published in 1817, replied that he did not think it did full justice to its subject. "The popular idea of Mr. Henry, gathered from Mr. Wirt's book, was that of a great orator. He was that and much more, a learned lawyer, a most accurate thinker, and a profound reasoner." Proceeding to compare him with Madison, he said: ⁴⁸

"If I were called upon to say who of all the men I have known had the greatest power to convince, I should perhaps say Mr. Madison, while Mr. Henry had without doubt the greatest power to persuade."

When Mr. Henry died, John Marshall said: ⁴⁹
"Virginia has sustained a very severe loss, which all good men will long deplore."

⁴⁸ Henry, vol. II, 376.

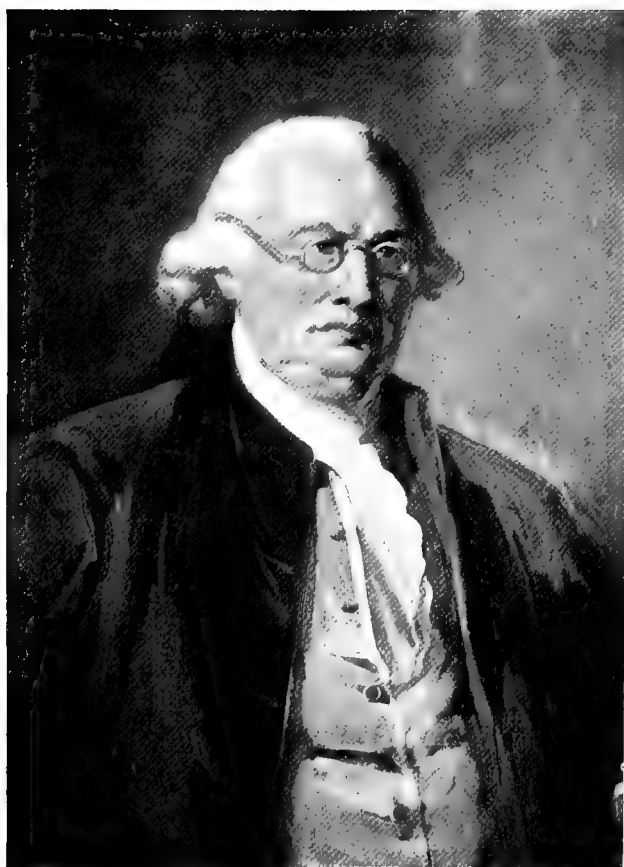
⁴⁹ Henry, vol. II, 629.

Patrick Henry died at Red Hill, June 6, 1799, and was buried at the foot of the garden. His grave is covered by a simple marble slab bearing the dates of his birth and death and the words, "His fame is his best epitaph."

JAMES WILSON.

JAMES WILSON

From a painting by Albert Rosenthal based on the figure in Trumbull's picture, "Signing the Declaration of Independence," and a miniature by an unknown artist, in the possession of Mrs. Thomas H. Montgomery of Philadelphia. The copyright of the etching is owned by Albert Rosenthal and is reproduced by his permission.



JAMES WILSON.

1742-1798.

BY

MARGARET CENTER KLINGELSMITH,

*Librarian of the Biddle Memorial Law Library of the University of
Pennsylvania.*

“**I**NDEED the character of this excellent man has been too little known—similar has been the fate of many other valuable characters in America. They are too little known to those around them, their modest merits have been too familiar, perhaps too uniform, to attract particular and distinguished attention; by those at a distance the mild and peaceful voice of their virtues has not been heard. But to their memories justice should be done, as far as it can be done, by a just and grateful country.” So said James Wilson, speaking to the assembled wit and wisdom of those states which he had so powerfully aided to become a country. The words were spoken in that first lecture upon law which he delivered in the year 1790,¹ to the newly created law class of the college which was later to become the University of Pennsylvania; the school that was in after years to honor him as its founder; as its first professor; as one of the wisest of its teachers. Yet how

¹ Wilson's Works, vol. I, 3. Phila. 1804.

well his own phrases—spoken of Lord Baltimore—apply in these later days to the man who spoke them more than a hundred years ago! Indeed his character has been too little known; his modest merit has not attracted attention; the mild and peaceful voice of his virtue has not been heard amid the noisier claims, the more showy attributes of many who have deserved far less from their country.

James Wilson was not a descendant of the early settlers; the stress and strain of colonial life had not helped to shape the character of his forebears, or to fashion the strength and sweetness of his own. He was a Scotchman, born in St. Andrews, September 14th, 1742, and educated, as to his earlier years, in the place of his birth, afterwards going to Glasgow and to Edinburgh, where he received that knowledge of the civil law which enabled a recent biographer and editor to call him "the greatest English speaking civilian of the age in which he lived." He had just passed his majority when he arrived in New York, but his impressionable period had by no means gone by; he was still a youth in whom enthusiasm, eagerness for improvement, avidity for knowledge, were at their keenest. This formative period of his life, was also that formative period of the country of his adoption, in which the vague beginnings of the national idea were gradually taking shape, to be finally formed into the Constitution of 1787.

From 1763 to 1775, while he was passing from the youth of twenty-one to the man of thirty-three, he

was in the very center of all that turmoil of the heart and brain, that unrest of the people, that was making, month by month, the later history of that people possible. Not born of them physically he soon showed himself to be of their kindred through those higher bonds of mind and heart by which men are bound one to another. He sometimes felt the reproach of that alien birth; he repelled the insinuation that such birth should be considered a reproach, when the question came up during the debates upon the Constitution,² but he repelled it without bitterness, even without a touch of that sarcasm of which he was a master—that swift lightning stroke that sometimes fell upon an adversary so suddenly out of the soft-seeming clouds of his customary benignity. In his Fifeshire home; in his student days in Edinburgh, he was among influences inimical to the England which was slowly absorbing his country.³ In the discussions of that time, to which a young man of so keen an intellect, so self-poised a mentality, must have listened with deepest interest, he heard England not praised, not admired, not referred to with the love and reverence with which he might have heard her mentioned had he lived farther south, but in terms of distrust, dislike, and disapproval. It may well have been that in those early days his love for liberty took root; that his faith in the ability of the people to govern themselves, was born; and that

² Elliott's Debates, vol. V, 399, 412.

³ Kellogg, Lippincott, vol. LXIII, 245.

he acquired that never-failing confidence, that serene sureness of faith in the principles which were afterwards to be the foundation stones of the great republic he was to be instrumental in forming.

It is probable that James Wilson, with his mind already busy with its investigations into the rights of man; already disturbed in its allegiance to the government under which he lived, felt that the life that lay before him in his native country was too narrow for the powers that he was conscious of possessing, and that the opportunities opening before him were not tempting. His father is said to have injured his business affairs by unfortunate speculations; therefore he could give his son little more than that good education which has rightly been considered, both in Scotland and America, better than any other species of wealth. Wider opportunities, greater freedom, and that fascination which a young, new country has for the mind that loves to explore, to overcome, to create, were all to be found in America. When James Wilson arrived in New York he was "An American in principle, if not by birth," for certainly no more sincere, loyal, devoted American was ever born among us than this young, highly educated Scotchman proved himself to be. It has been said that he brought to his new home little of that which we are accustomed to call wealth, but he possessed a mind rich in such training as could be given by two famous men; Dr. Blair, who was his tutor in rhetoric, and Dr. Watts, under whom he was in-

structed in both logic and rhetoric—that learning which in later life was to give him the power to move minds with his eloquence and to sway them with “an almost irresistible logic.”

After spending some time in New York, Mr. Wilson went to Philadelphia, well provided with letters to persons in that city. One of these letters was to Dr. Richard Peters, rector of Christ and St. Peter's churches, who proved himself a most devoted friend to the young stranger. Doctor Peters, himself a man of learning, a lover of wisdom, and desirous of furthering the cause of education, was a trustee of the Philadelphia College and Academy, and recognizing the exceptional qualifications of Mr. Wilson, introduced him to the trustees of that institution. He triumphantly acquitted himself, upon examination, being considered by the examiners the best classical scholar who had ever offered himself to them as a tutor in the Latin department of the college. His mind turned naturally to the study of the law, however, and through the influence of the friends whom he had drawn to him during his short residence in the city, especially through the friendship of Doctor Peters and of Bishop White, he secured the privilege of studying law in the office of Mr. John Dickinson. This step involved the loss of his salary as tutor in the College of Philadelphia, and funds were provided by mortgaging a farm in Scotland. Two years of arduous application fitted Mr. Wilson for the practice of his profession, and at the end of

this period of study he was admitted to the bar. He did not at once settle in Philadelphia, but first went to Reading, where he remained for a short time. He then removed to Carlisle, where he lived until 1777. He then went to Maryland for one year, finally settling in Philadelphia in 1778.

When about thirty years of age, and soon after taking up his residence in Carlisle, Mr. Wilson was married to Miss Rachel Bird, the youngest daughter of William Bird, of Bucks County, Pennsylvania. Mr. Bird, the father, was the proprietor of extensive iron works on the banks of the Schuylkill river, and he resided near them upon an estate called, from the family name, "Birdsborough." Six children were born of this union, two daughters and four sons. Mr. Wilson's family life, like his public life, was of a character to secure the "reverence and affection of all about him." In this relation he showed the simplicity, the serene kindliness, which are characteristic of the philosopher and philanthropist of all times.

An anecdote is told of the early days of Mr. Wilson's practice, which shows the impression he made upon his contemporaries at the bar. He was employed as counsel for a Mr. Wallace, a dealer in lands, in a suit in which the opposing parties were the proprietaries of Pennsylvania. Mr. Chew, then attorney-general, was of counsel for the proprietaries. It was noticed, soon after Mr. Wilson began to speak, that Mr. Chew fixed his eyes upon him with an intense interest, and remained in that atti-

tude to the end of the argument. Counsel on the same side with Mr. Wilson consulted as to whether it would be best to add anything to the argument of Mr. Wilson, who had spoken first. They decided it would be best not to do so. Before the court had closed its session Mr. Wilson had been retained in another proprietary cause; "and his standing at the bar was henceforth lofty, firm and unalterable."⁴

Not long after Mr. Wilson had become thus firmly established in his profession, the first movements of the struggle between the colonists and the mother country took place. He had already begun his literary labors by writing, conjointly with Bishop White, a number of essays, under the title of "The Visitant." But it was while living in Carlisle that he began the publication of those political pamphlets which had so much influence upon the minds of his contemporaries. In 1774 he published the pamphlet entitled, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament,"⁵ which was greatly admired at the time, and which shows how his mind was already working along the lines in which he was to do so much for the remainder of his life. In this essay, he denied, in every instance, the authority of the British Parliament over the colonies. His argument was based upon broader grounds than any that had theretofore been advanced, but these grounds were

⁴ Sanderson, *Lives of the Signers*, James Wilson, p. 2.

⁵ Wilson's Works, vol. III, 203. Phila. 1804.

afterwards generally adopted by others. He showed, here as always, the originality which was so marked a feature of his mind: he was an originator, a leader, a pioneer; and those who used his ideas and followed in the path he had marked out, too often reaped what he had sown, with no thought of recognition of the sower. It is in this essay that he wrote:

All men are by nature equal and free; no one has a right to any authority over another without his consent; all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government.

If this paragraph had been written after the Declaration of Independence had been published to the world there can be little doubt that Mr. Wilson would have been thought to have absorbed both the words and the sentiments of that document to a degree that amounted to plagiarism. As it was written in 1774, it must be equally apparent that Mr. Wilson had formulated the ideas and created some of the phrases of the Declaration two years before it took its final shape.

The provincial congress of Pennsylvania met in the early summer of 1774, before the delegates had been appointed to the first general congress. It was soon understood that the delegates would be appointed at the first meeting of the Assembly, and dur-

ing the Convention Mr. Wilson exhibited so many of the talents which were afterwards to render him a leading figure in the events of the time, that it was recommended that he should be among the delegates. This recommendation was rejected, at the same time that Mr. Dickinson, Mr. Wilson's former teacher, was refused an appointment. Mr. Galloway, the speaker of the Assembly, differed with them in political opinions, and had, it is said, a personal enmity toward Mr. Dickinson. The pupil had thus been raised to an equality with his former preceptor only to be rejected with him as a candidate for this honorable position. The adverse decision was soon reconsidered, however, and on May 6, 1775, the Assembly of Pennsylvania added Thomas Willing, Benjamin Franklin, and James Wilson to the delegation. Mr. Wilson took his seat May 10, 1775; he was re-appointed November 3, 1775; July 20, 1776, and March 10, 1777. Before the latter dates, however, much had happened. Events in the political world were bringing the colonists more and more rapidly to the point at which they were able to consider separation from England as a possibility. In January, 1773, in a speech before the Convention of Pennsylvania, Mr. Wilson defended the colonists against the reports, circulated in England, that they were "licentious and ungovernable." He follows the course of the English government in regard to the colonies; depicts in language that has still the power to stir men as it had when it was first uttered,

the attempts of the colonists to preserve their liberties and at the same time their faith in, and allegiance to, the mother country. He protests the right of the colonists to protect themselves, and asks:

Were the colonists so blind as not to discern the consequences of these measures? Were they so supinely inactive as to take no steps for guarding against them? They were not. They ought not to have been so. We saw a breach made in those barriers, which our ancestors, British and American, with so much care, with so much danger, with so much treasure, and with so much blood, had erected, cemented and established for the security of their liberties and — with filial piety let us mention it — of ours; we saw the attack actually begun on one part: ought we to have folded our hands in indolence, to have lulled our eyes in slumbers, till the attack was carried on, so as to become irresistible, in every part? Sir, I presume to think not. We were roused; we were alarmed, as we had reason to be. But still our measures have been such as the spirit of liberty and of loyalty directed; not such as a spirit of sedition or of disaffection would pursue. Our counsels have been conducted without rashness and faction: our resolutions have been taken without phrenzy or fury.

All the troubled feelings of the time: the thoughts and hopes and fears, the respect for authority and desire for liberty, the love for the old order of things and the hatred of the new oppression, find here their appropriate expression. In principle and in manner it parallels the Declaration of Independence, citing the same grievances, declaring the same fundamental truths. But the time was not yet quite ripe for a complete rupture with the home government, and Mr. Wilson disclaimed any disloyalty to the crown

or to the British constitution. He declared that the colonists were loyal, but that ministers had been made the instruments of an oppression too intolerable to be borne. Yet he sees the inevitable approaching:⁶

We behold — Sir, with the deepest anguish we behold — that our opposition has not been as effectual as it has been constitutional. The hearts of our oppressors have not relented: our complaints have not been heard: our grievances have not been redressed: our rights are still invaded: and have we no cause to dread, that the invasions of them will be enforced in a manner, against which all reason and argument, and all opposition of every peaceful kind, will be vain? Our opposition has hitherto increased with our oppression: shall it, in the most desperate of all contingencies, observe the same proportion?

Let us pause, Sir, before we give an answer to this question: the fate of us: the fate of millions now alive: the fate of millions yet unborn depends upon the answer. Let it be the result of calmness and intrepidity: let it be dictated by the principles of loyalty, and the principles of liberty. Let it be such, as never, in the worst events, to give us reason to reproach ourselves, or others reason to reproach us for having done too much or too little.

In such words as these James Wilson, delegated by the people to speak for them, voiced all they dumbly felt. No voice more eloquent could have been found for them.

The re-appointment of Mr. Wilson to the Continental Congress, in November, 1775, proved to be a most important event, not only in his own history,

⁶ Wilson's Works, vol. III, 258. Phila. 1804.

but in its effect upon those measures which were to be of such vital import to his country. The men of that congress were to shape and give to the world the Declaration of Independence. The delegates from Pennsylvania were divided in their opinions. John Dickinson, Robert Morris, Charles Humphreys, and Thomas Willing were opposed to the Declaration. Benjamin Franklin, James Wilson, and John Morton favored it. The attitude of Mr. Wilson during the sessions of Congress preceding the second of July, and in the final debate itself, is in perfect accord with the principles upon which he uniformly acted.

On the fifteenth of May, 1776, Congress adopted a resolution recommending all the colonies to form for themselves independent governments. John Adams had written a preamble which caused a hot debate. To adopt it was in effect to declare independence. James Duane, of New York, said that he believed that the people would sustain such a declaration, but that he would not yet believe they were not destined to receive a favorable answer to their demands; he objected to so much haste and urging. Fiske, in his account of this meeting says:⁷

James Wilson, of Pennsylvania, one of the ablest of all the delegates in that revolutionary body, urged that Congress had not yet received sufficient authority from the people to justify it in taking so bold a step.

⁷ Fiske, *American Revolution*, vol. I, 182.

It seems that Mr. Wilson had first stated the progress of the dispute between Great Britain and the colonies; declared it to be his opinion that the colonies would stand justified before God and the world in declaring an absolute separation from Great Britain forever; and that he believed that the people of Pennsylvania were in favor of independence, but that the sense of the assembly as delivered to him by their instructions was against the proposition. He therefore wished the question to be postponed, because he had reason to believe that the people of Pennsylvania would soon have an opportunity of expressing their sentiments, and he thought the people should have an opportunity given them to signify their opinion in a regular way upon a question of such importance. Delegates from other colonies were bound by instructions to disagree to the proposition and he thought it right that the constituents of these delegates should have an opportunity of debating upon it. It is evident that Mr. Wilson comprehended fully the need that the delegates should be supported by those who had clothed them with their powers. He looked, in all these proceedings, to the end in view; saw the subject on all sides; knew where too rapid a movement would defeat that end and how to so marshal his forces as to bring them together at the critical moment. He was then bending all his energies to secure for the Declaration the support of the people, which to his mind could be its only sanction. To

so ardent and confirmed a supporter of the rights of the people no movement could be well timed if made before the people were ready. It must be by their consent and command that such a thing should be done. So he waited until they should have expressed their will. This expression came to him two days after he had made this speech, when the instructions of the Assembly were altered and new instructions given to the delegates from Pennsylvania. He was now free to act, and said that being now unrestrained, if the question were put he should vote for it. But the people had as yet only spoken through the voice of a body not elected with that subject in mind. The deputies of the people of Pennsylvania were soon to meet to give their opinion upon the matter; other members were still under negative instructions; the people of several colonies had not yet recalled their objections. Until the people had spoken there was fear that unanimity could not be obtained.⁸ All this is eminently judicious and characteristic. To him there was one ideal government, government by the people; all other governments were in their several degrees tyrannical, a benevolent tyranny as tyrannical as any. The best action taken by a delegate or official of the people against their expressed will or in violation of their wishes he believed to be an act of

⁸ A certificate, signed by John Hancock, Samuel Adams, Thomas Jefferson, Robert Morris, and nineteen other members of the Congress certifies to the action of Mr. Wilson as stated above. This certificate is in manuscript in the Library of Congress.

tyranny. This being so, he could not act until the people had acted. The advocates of delay were successful, and on the seventh of June, after a long debate, the motion of Edward Rutledge, of South Carolina, to postpone the question for three weeks, was carried. The people were active during those three weeks and when the first day of July came there could be little doubt as to what they wished. Twelve of the colonies had finally committed themselves to the cause of independence. New York alone sent delegates without instructions, and her delegates were excused from voting. In Pennsylvania there had been a hot discussion; the Quakers desired, at any price, to avoid an armed conflict; the proprietary, very naturally, exerted itself against independence. On the eighteenth of June a convention was held to decide on the question of independence, and there were six days of earnest discussion, which terminated in a vote for separation. The people had spoken; the wisdom of delay was made manifest. That practical unanimity which Mr. Wilson had so much desired had been secured. When Congress, on the first of July, resolved itself into a committee of the whole, to "take into consideration the resolution respecting independency," the delegates of but two states were opposed to the Declaration. John Dickinson, of Pennsylvania, made a powerful speech in opposition; and four of the votes of that state were in the negative; Mr. Wilson, with Franklin and John Morton, voted in the affirmative.

The next morning, the second of July, Delaware changed her vote to the affirmative; Dickinson and Morris stayed away. Franklin, Morton, and Wilson voted in the affirmative; the great state of Pennsylvania was won for the cause of independence; and the states had voted unanimously for it. It is largely due to Mr. Wilson that the votes which won this victory were not those of uninstructed delegates but those of men acting in accordance with the expressed will of the people. The firm, bold signature of James Wilson stands out clearly from among the names of those who, by the placing of their names on so significant a document, proved to the world their willingness to devote their lives and all that made them valuable to the upholding of a government in which the only sovereign should be the people.

While a member of Congress Mr. Wilson had been one of the most active and able of its members. In the summer of 1775 he was a member of the committee which prepared an eloquent and moving appeal to the Assembly of Jamaica, and in July of the same year he was elected a commissioner of the middle department to superintend Indian affairs—the Indians having been divided into three departments, the northern, southern and middle. He was a member of many other committees, one of the most important being that to confer with Washington and concert a plan of military operations. He thus proved himself in every way an active and ardent

worker, giving to this work, as to all work that he undertook, a most conscientious attention.⁹

It may be because of all this activity that he made many enemies: to act is often to act against the interests of some one; to act vigorously and constantly in matters upon which public opinion is hotly divided, is to act against the self interests of many. James Wilson had acted vigorously, constantly, and in co-operation with those who were willing to sac-

⁹ Sanderson, in his *Lives of the Signers*, gives the following paragraph to Wilson's committee work:

"He was also a member of the several committees, to take into consideration the state of the colonies, and report what number of forces would be necessary for their defense; to prepare a letter to the inhabitants of Canada; to prepare an address to the United Colonies;—to take into consideration the state of the Indians in the middle department;—to consider on the most speedy and effectual means for supporting the American cause in Canada;—to confer with General Washington, and concert a plan of military operations;—to devise ways and means for supplying the treasury;—to form an effectual plan for suppressing the internal enemies of America;—to devise and execute measures for effectually reinforcing General Washington, and obstructing the progress of General Howe's army;—to take into consideration the state of the army;—to explain to the several states the reasons which induced Congress to enlarge the powers of General Washington;—to consider what steps were necessary to be taken, should the enemy attempt to penetrate through New Jersey, or to attack Philadelphia;—to devise a plan for encouraging the Hessians, and other foreigners, employed by the king of Great Britain, and sent to America for the purpose of subjugating the states, to quit that iniquitous service, etc., etc., etc. He was a member of the standing committee on Indian affairs, and of the standing committee to hear and determine upon appeals brought against sentences passed on libels in the courts of admiralty in their respective states. He was also attached to the first board of war. In fact, no member was more frequently called upon to exert his talents, and no member exhibited more industry, capacity, and perseverance, in obeying the calls of duty, than James Wilson."

rifice the selfish interests of themselves and others for the common cause; therefore he made enemies. His foreign birth was used as an argument against him. "I will never trust a Scotchman again," wrote one of his enemies. "They cannot be honest when liberty is in question."¹⁰

The details of the debates which preceded the Declaration were not then known to the people, or James Wilson would have been known to them as he was to his colleagues, as one of the most ardent and earnest of all the advocates for independence.

During the period of Mr. Wilson's absence from Congress, M. Gerard, minister plenipotentiary of France, finding it necessary to secure for his country some person to settle the constant disputes which arose between the citizens of France and the citizens of this country, regarding many matters of importance, entered into negotiations with Mr. Wilson for the purpose of appointing him advocate-general of the French nation in the United States. June 5, 1779, M. Gerard made the appointment; Congress was notified, September 15, 1779; and February 18, 1781, the King of France issued letters patent confirming the appointment under his hand, stating it to have been made, "in consideration of the zeal and attachment which he had, on various occasions, shown toward the subjects of his majesty." The original commission still exists, signed by the hand of

¹⁰ See Sanderson's *Lives of the Signers* for a long and detailed account of the political activities against Mr. Wilson, and the letters and expressions of sentiment of the time.

the king and is preserved in the library of the Law Department of the University of Pennsylvania, which honors Wilson as its founder. The reasons for choosing Mr. Wilson are given in these words of the commission:

The daily discussions which arose in the different parts of United America, relative to commerce and navigation, and the establishment of fiscal regulations on those subjects, formed an object of great labor and importance, which can only be confided to a person versed in the laws and international administration of America, as well as in the rights of man, and the general usages of commerce; and the experience and talents of which Mr. James Wilson has afforded us many brilliant proofs making him worthy of this nomination, we hereby appoint and constitute him, subject to the good pleasure of the king, and until his decision be known, advocate general of the French nation, in the thirteen United States.

Mr. Wilson found himself in a position of considerable delicacy and importance. He was a pioneer, a maker of paths in the wilderness. He felt the position fully, saying:

I fancy myself in the position of a planter, who undertakes to settle, and cultivate a farm in the woods, where there has not been one tree cut down, nor a single improvement made.

He was well aware, both of his attainments and of his deficiencies, and in his own words, written in a letter to a friend, he vividly depicts the situation:

A close study of the laws of England and of this country, for upwards of thirteen years, and an extensive practice during the

greater part of that period, entitle me to say, that I am not altogether unacquainted with them. I have given attention to the laws of nations. Since I have been honored with the nomination to be advocate general, I have directed my studies to the laws and ordinances of France; but I am very deficient in the knowledge of them. Nothing but intense application, for a considerable time, can make me so much master of them, as to do justice to the office, or to derive reputation from it to myself. As the trade of France with the United States shall increase, the number of processes in which the kingdom will be interested, and of cases in which law opinions must be given, will increase in proportion. To give a safe opinion upon any particular point, however simple, or detached it may appear, requires a general knowledge of the laws from which it ought to be deduced.

The "intense application" which Mr. Wilson declared to be necessary to the proper fulfillment of his duty, was not wanting in him. He gave up a large part of a valuable practice to devote his time to a conscientious study of those laws which he was called upon to apply. Through arduous labor he was able, early in 1780, to submit to the minister plenipotentiary a draft of a general plan, concerning the jurisdictions and proceedings of courts in commercial causes, in which the subjects of France were parties, and also in regard to the functions of consuls. No reflections are known ever to have been made upon the manner in which Mr. Wilson discharged this arduous duty, or upon his conduct of the office he had sacrificed so much to accept; but in spite of this fact, and of the additional fact that he had stipulated, upon accepting the post, that an annual salary should

be annexed to it, no payments were made by France, and in 1782 the Duke de Luzerne actually announced that the king had no intention of attaching an annual salary to the post. Mr. Wilson immediately replied that he should not have accepted the appointment upon such terms and that he could no longer divert so much of his time and attention from the practice and study of the law as he had done, adding,

But, Sir, I am a citizen of the United States, and feel what I owe to France. While the king is making such generous and expensive efforts in behalf of my country, any service of which my situation and circumstances will admit, is due to him. With the greatest cheerfulness, therefore, I will, during the war, give my best advice and assistance, in the line of my profession and practice, concerning such matters as the ministers and consuls of France will do me the honor of laying before me.

In November, 1783, he received from the king ten thousand livres, as a recognition of the services which he rendered to France. Mr. Wilson's conduct in this matter showed both independence and a high sense of honor. He seems to have felt that, having given up the emoluments of his large practice to so great a degree, he might become dependent upon the whims of ministers and consuls. To be dependent financially is to become dependent morally. Therefore their desires and their wishes would have a greater weight in such circumstances than they otherwise might. For this reason he declared he would be "dependent only upon the king," whose one object in the appointment must be supposed to be that jus-

tice should be done between the citizens of France and America.

In September, 1777, the same faction which had before defeated Mr. Wilson's nomination for Congress, reasserted itself, and his friends foresaw that it was again probable that it would defeat his reelection. Robert Morris wrote him that he feared that even the "honesty, merit and ability, which you possess in so eminent a degree" would not be sufficient pleas against the determination of a strong party which he believed existed. This fear was justified, for on September 14, 1777, the new delegation elected consisted of Joseph Reed, William Clemency, and Dr. Samuel Duffield, who were chosen to succeed Jonathan B. Smith, who had resigned, and "James Wilson and George Clymer, Esquires, who are hereby superseded."

The strong party feeling indicated by this action soon showed itself in other ways. By the year 1779, two parties had become well defined; the constitutionalists and republicans opposed each other with a bitterness which naturally bore fruit in acts of disorder and even violence. The constitutionalists opposed Mr. Wilson, who was then a leading member of the republican party, and who was one of a number of persons in that party who had agreed not to accept any office or appointment under the Constitution, in order that they might not be bound to support it. Times were "hard," paper money almost valueless. The merchants were believed by the people

to be in a conspiracy to monopolize the goods in which they dealt, and those who defended them in court were supposed to be implicated in their evil designs. Wilson had so defended them. He had all the qualities which make a great man hated by smaller men, and none of the smooth hypocrisies which catch popular favor; he was therefore chosen to be the victim of one of those popular uprisings by which the rougher element of the opposite party chose to express its sentiments. When one looks upon the serene, benevolent, gently benignant, face of James Wilson, as his portrait shows it to us, it may be well to remember that his character had other aspects, and that he was called upon to defend, not only attacks upon his character, but that he had also to repel a violent attack upon his life; and that his house, from the fame of the assault upon it, became known as "the fort." In September, 1779, the town meeting of Philadelphia had appointed a committee which had regulated the prices at which rum, salt, sugar, coffee, flour, and other staple articles, should be sold. The importers—Robert Morris, Blair M'Clanachan, and others—refused to dispose of their goods at the stated prices. This caused great dissatisfaction, and during the rest of September small mobs collected at various times and marched through the city, threatening to break open the stores, and to distribute the goods among the people. Placards were posted, menacing Morris and others. Wilson was to be punished by banishment to the

enemy who then held New York. The men who were menaced determined to defend themselves, and met together in the house owned and occupied by Mr. Wilson, which is described as a large, old fashioned brick building with a large garden, situated on the corner of Third and Walnut streets, in Philadelphia. The exact number of those who assembled in the house is not known, but among them were Wilson himself, Morris, Burd, the Clymers—George and David—McLean, Delany, Lawrence, Robinson, Potts, Samuel C. Morris, Beck, Captain Campbell, and Generals Mifflin, Nichols and Thomson. These, with others whose names are not known, are supposed to have made up a company of about thirty, or by some accounts—forty, in number. They had taken the precaution to be provided with arms, but they had no stock of ammunition. While the mob was on the way, General Nichols and Daniel Clymer hastily proceeded to Carpenter's Hall, which was then used as an arsenal, and filling their pockets with cartridges, hastened back to their companions.

The mob and the militia assembled in the open spaces outside the city, while the leading citizens gathered at a coffee house, from which a deputation was sent to the mob, urging them to disperse, but without effect. The first troop of city cavalry appointed a place of rendezvous and agreed to be ready to mount at a moment's warning. The dinner hour came; all was quiet; the cavalry went to dinner; the mob, numbering about two hundred, seized the op-

portunity, marched to Mr. Wilson's house, and being provided with two pieces of cannon began the bombardment. Their fire was returned by the besieged, and the mob, whose cannon were apparently rather ineffectual, finding that their efforts were frustrated, proceeded to use weapons to which they were probably more accustomed, and by the effective use of a sledge hammer and crow bar, procured from a blacksmith's shop, succeeded in forcing the door. At this moment, when the lives of all within the house stood in imminent peril, the city troop—to the number of seven—charged the mob, and the cry of "the horse! the horse!" being raised, a sudden panic seized the rioters, who did not stop to learn the number of those who had come to the rescue, but fled at once; and the danger was over for the moment. Within the house Captain Campbell had been killed, and Mr. Mifflin and Mr. Morris had been wounded, while of the attacking party a man and a boy had been killed, and a number had been wounded. It was several days before order was completely restored in the city, and violence was attempted and numerous threats made against all those who had defended themselves in Mr. Wilson's house. They were advised to leave the city, but at a meeting held by those threatened, it was decided that most of them should remain. It was deemed advisable, however, that Mr. Wilson, whose house had formed the "fort" where the stand was made, should be for a time absent from the scene of the trouble.

At the time of this occurrence Mr. Wilson bore the title of colonel, having been chosen colonel of a regiment at the time when military movements were first made. He was at that time a resident of Carlisle, in Cumberland county, in which county the regiment was raised. He acted in this capacity when necessary, and the public stores and magazines in Carlisle were committed to his care, but he was never in active service in the field, his civic duties during most of the period of the war occupying him to the exclusion of other affairs. Mr. Wilson was afterwards made brigadier-general of the Pennsylvania militia; the appointment bearing date, May 23, 1782.

In 1781, Congress appointed Mr. Wilson one of the directors of the Bank of North America. It was while serving as a director of this bank that he wrote the pamphlet entitled "Considerations on the Power to Incorporate the Bank of North America." A bill had been introduced into the legislature of Pennsylvania intended to repeal the act of 1782, which had granted a charter to the Bank of North America. An attack had been made on the credit of the bank, and it had been denounced as injurious and dangerous. In his defense of the bank Mr. Wilson made an examination into the powers of the legislature under the constitution, which, while made before the Constitutional Convention of 1787, and therefore before any discussion had been made in public of the constitutional questions which were to arise both during the debates upon the Constitution, and in the

cases which were to come before the courts, covers in the clearest, most concise and logical manner, all the important points since brought up and decided by the great constitutional law cases, involving the implied powers of the United States, which have come before our Supreme Court.¹¹

In June, 1782, Mr. Wilson was appointed by the President and Supreme Executive Council, a counsellor and agent for Pennsylvania in the controversy which had arisen between that state and Connecticut in regard to what is now known as "The Connecticut Claim." Mr. Wilson delivered a "luminous and able argument" in this case, and the unanimous decision in favor of the contention of Pennsylvania was due largely to his efforts.

April 7, 1785, Mr. Wilson was re-elected to Congress, and again on March 7, 1786. In the work of the Congress during these years he was earnest, active, and energetic in his labors for the public good. But conditions under the Federation were rapidly approaching a crisis; public affairs could no longer be administered under the system which had obtained since the separation of the states from England. The state of affairs at that time is nowhere more completely pictured than in the words of Wilson himself:

When we had baffled all the menaces of foreign power, we neglected to establish among ourselves a government, that would ensure domestic vigor and stability. What was the consequence?

¹¹ Wilson's Works, vol. III, 395. Phila. 1804.

The commencement of peace was the commencement of every disgrace and distress, that could befall a people in a peaceful state. Devoid of national power, we could not prohibit the extravagance of our importations, nor could we derive a revenue from their excess. Devoid of national importance, we could not procure for our exports a tolerable sale at foreign markets. Devoid of national credit, we saw our public securities melt in the hands of the holders, like snow before the sun. Devoid of national dignity, we could not, in some instances, perform our treaties on our parts; and, in other instances, we could neither obtain nor compel the performance of them on the part of others. Devoid of national energy, we could not carry into execution our own resolutions, decisions or laws.

Shall I become more particular still? The tedious detail would disgust me; nor is it necessary. The years of languor are past. We have felt the dishonour, with which we have been covered: we have seen the destruction with which we have been threatened. We have penetrated to the causes of both, and when we have once discovered them, we have begun to search for the means of removing them.

The history of the search for the means of removing them is well known to the student of that era. When the time came for Pennsylvania to select her delegates to the convention to be held in Philadelphia for the purpose of framing a constitution for the United States, Mr. Wilson was, most naturally, selected as a member. He had now become the acknowledged head of the Philadelphia bar; his exceptional learning in the civil law was known; in his public speeches he had shown oratory of the highest order; the convincing quality of his logic, so often shown in the debates in Congress, marked him as a

man peculiarly well equipped for the task before the convention; the task to which he was to give his best energies, his highest qualities of mind and heart; in which he was to enshrine so much of himself.

It is difficult adequately to express the value of his services in this convention. When Sanderson was writing his "Lives of the Signers," a member of the convention, whose name he does not give, observed that, "In his opinion, the most able and useful members of the convention were James Wilson and James Madison; that he is in doubt which of these deserves the preference, but is inclined to give it to the former." McMaster says,¹²

Of the fifty-five delegates he [Wilson] was undoubtedly the best prepared by deep and systematic study of the history and science of government for the work that lay before him . . . none, with the exception of Gouverneur Morris, was so often on his feet during the debates, or spoke more to the purpose.

Fiske calls him one of the most learned jurists this country has ever seen. He was "one of the four men who bore the burden and the heat of the day" in the long and heated debates of the convention. He was consistently an advocate of the rights of the people, believing that they should be as directly represented as possible. "He was for raising the Federal pyramid to a considerable altitude, and for that reason

¹² McMaster, *History of the United States*, vol. I, 421. See also McMaster & Stone, *Pennsylvania and the Federal Constitution*, p. 699, where they say: "Gouverneur Morris and James Wilson led the debate in the convention. The former spoke one hundred and seventy-three times, the latter one hundred and sixty-eight times."

wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people."

He anticipated the feeling against the choice of the Senate through the medium of the state legislatures, and desired that both branches of the national legislature should be elected by the direct vote of the people.¹³ He never deviated from this position throughout the course of the Convention. He declared that in forming a constitution he was not governed by a British model, stating that he believed that the extent of the country was so great and the manners so republican that nothing but a great confederated republic would do for it. He "wished for vigor in the government, but he wished that vigorous authority to flow *immediately* from the legitimate source of all authority. The government ought to possess not only, first, the *force*, but, second, the *mind* or *sense* of the people at large. The legislature ought to be the most exact transcript of the whole society."¹⁴

He especially insisted upon an equitable ratio of representation; it was the only plan, he said, upon which Pennsylvania would confederate. With a great attachment to the state governments he united a firm belief in the necessity of a strong national government; feeling that it was probable that the states would acquire power at the expense of the nation,

¹³ Elliott's Debates, vol. V, 136, 137, 168, 239.

¹⁴ Elliott's Debates, vol. V, 160.

rather than that the nation would grow strong through weakening the powers of the states. It seems clear that this latter opinion grew out of the temporary condition of confusion in which the states found themselves at the close of the Revolution, and the few years immediately succeeding,¹⁵ combined with the impression made by the local jealousies which had caused so much friction during the years of struggle, and which were a source of so much dread during the critical time when the Constitution was in process of making. Past history and present conditions all confirmed the idea that local self-interest would prevail over national self-interest. The conditions prevailing around them were present in the minds of all; possibly more strongly present in the mind of Mr. Wilson,¹⁶ who had been so active in the Congress and in the military movements; who had been in touch with every phase of the Revolution, and knew all the difficulties of the situation through having faced each in its turn. Prophet though he was, he necessarily was blind to the immense economic changes which were to mark the course of the coming century, binding so closely the lives of all the citizens into one interest, that the danger would come to lie, not in the selfishness of the separate states, but in the gradual absorption of power by the central government.

Throughout the debates Mr. Wilson maintained a

¹⁵ Elliott's Debates, vol. V, 172.

¹⁶ Elliott's Debates, vol. V, 219, 221.

clear, logical, and firm mind upon all the questions debated. He supported his own views with vigor, but endeavored to harmonize rather than antagonize the ideas which were not in accord with his own. His desire that the Convention should be carried to a successful issue was intense, and he was ready to give up anything but his fixed principles to secure that end. But he believed that only by strict adherence to the best principles could harmony be attained, and that no permanent success could be secured "if the foundation should not be laid in justice and right."¹⁷

July 23, 1787, it was resolved, "That the proceedings of the Convention for the establishment of a national government, except what respects the supreme executive, be referred to a committee for the purpose of reporting a constitution conformably to the proceedings aforesaid." The committee was appointed the next day. The members chosen were: Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Ellsworth, and Mr. Wilson. On August 6, 1787, they reported the draft of a constitution. Mr. Wilson's influence upon this report was very great. Shirley says that "Judge Wilson" (he was not then judge, however), "was even more to the committee on detail than Morris to that on style."¹⁸ Shirley also says, "He was not only a master of the civil law, but of the French and Scotch law, which had the

¹⁷ Elliott's *Debates*, vol. V, 285.

¹⁸ Shirley, *Dartmouth College Causes*, p. 214.

civil law for its basis, and of the common law as well.”¹⁹ This knowledge of the civil law and of the continental law which had grown from it, gave Mr. Wilson an authority which was not exceeded by any member of the Convention. He is the reputed author of the “obligation clause,”²⁰ which is supposed to have had its origin in the Roman law. He had always asserted that a legislative grant was a contract, and had held that in some cases the charter of a corporation might be a contract. We have no record of the debates of the committee, and it is now impossible to discern the exact part which each of the five members took in framing the draft which they finally presented, and which is still in existence in the handwriting of Mr. Wilson; but it is safe to assert that Mr. Wilson, in point of learning, originality of thought, and lucidity of style, was at least the equal of any member of the committee.

The Constitution was finally agreed to and signed on September 17, 1787, and then came the struggle for ratification by the states. Mr. Wilson was chosen a delegate to the convention which was called for Pennsylvania, and the era of speech-making began. Of this period Mr. Fiske says, in his “Critical Period of American History”:

And now ensued such a war of pamphlets, broadsides, caricatures, squibs, and stump speeches, as had never yet been seen in America. . . . And now came James Wilson, making speeches

¹⁹ Shirley, Dartmouth College Causes, p. 220.

²⁰ Shirley, Dartmouth College Causes, p. 216.

in behalf of this precious constitution, and trying to pull the wool over people's eyes and persuade them to adopt it. Who was James Wilson any way? A Scotchman, a countryman of Lord Bute, a born aristocrat, a snob, a patrician, Jimmy, James de Caledonia. Beware of any form of government defended by such a man. . . . Then there was Hamilton and Madison, mere boys; and Franklin, an old dotard, a man in his second childhood. And as to Washington, he was doubtless a good soldier, but what did he know about politics. . . . But the logic and eloquence of James Wilson bore down all opposition.

Doubtless one of the speeches referred to was that delivered by Mr. Wilson, on the sixth of October, at a great mass meeting in Philadelphia. This speech is considered a remarkable example of his powers, and it had a very marked influence upon the public mind. He confesses that he expects opposition to the adoption of the Constitution, but he shows that he believes opposition to be rather for selfish ends than because of any principle in the opposers. In that speech he said: ²¹

It is neither extraordinary nor unexpected, that the constitution offered to your consideration, should meet with opposition. It is the nature of man to pursue his own interest, in preference to the public good; and I do not mean to make any personal reflection, when I add that it is to the interest of a very numerous, powerful and respectable body, to counteract and destroy the excellent work produced by the late convention.—Every person, therefore, who enjoys or expects to enjoy, a place of profit under the present establishment, will object to the proposed

²¹ McMaster & Stone, *Pennsylvania and the Federal Constitution*, pp. 148, 149.

innovation;—not, in truth, because it is injurious to the liberties of his country, but because it affects his schemes of wealth and consequence. I will confess, indeed, that I am not a blind admirer of this plan of government and that there are some parts of it, which, if my wish had prevailed, would certainly have been altered. But when I reflect how widely men differ in their opinions, and that every man,—and the observation applies likewise to every state,—has an equal pretension to assert his own, I am satisfied that anything nearer to perfection, could not have been accomplished. If there are errors, it should be remembered, that the seeds of reformation are sown in the work itself, and the concurrence of two-thirds of the Congress, may, at any time, introduce alterations and amendments. Regarding it, then, in every point of view, with a candid and disinterested mind, I am bold to assert, that it is the best form of government which has ever been offered to the world.

With this feeling he went into the Convention which met the third Tuesday in November, 1787, prepared to expound, uphold, and commend, that instrument. He was the only member of the state convention who had also been a member of the Federal convention, and he felt bound to make 'known to the delegates all that he could of the reasons for the framing of the Constitution in the form in which it was presented to them. The eloquence, the wisdom, and the wit, with which his task was performed can only be understood by first tracing his course in the debates of the Convention itself, and following this by a close reading of the speech which he delivered before the ratifying convention on the 26th of November. Curtis calls this speech "One of the most comprehensive and luminous commentaries on

the Constitution that have come down to us from that period.”²² McMaster says that if it had not been for this speech the Constitution would not have been adopted.²³ His devotion to the cause of the people; his belief that in them all power should be vested, and that the Constitution, recognizing that right, had so vested it; were eloquently expressed toward the end of the strong speech. He had been explaining the source of power, and especially the power of the British Parliament; he then goes on to say:²⁴

Perhaps some politician, who has not considered, with sufficient accuracy, our political systems, would answer, that in our governments, the supreme power was vested in the constitutions. This opinion approaches a step nearer to the truth, but does not reach it. The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures; so the people are superior to the constitutions. Indeed the superiority, in the last instance, is much the greater; for the people possess, over our constitutions, control in act, as well as in right.

The consequence is, that the people may change the constitutions, whenever and however they please. This is a right, of which no positive institution can ever deprive them.

These important truths, sir, are far from being merely speculative: we, at this moment speak and deliberate under their immediate and benign influence. To the operation of these truths, we are to ascribe the scene, hitherto unparalleled, which America now exhibits to the world — a gentle, a peaceful, a voluntary, and

²² Curtis, *History of the Constitution*, vol. II, 464.

²³ McMaster & Stone, *Pennsylvania and the Federal Constitution*, p. 758.

²⁴ Wilson's *Works*, vol. III, 292-295. Phila. 1804.

a deliberate transition from one constitution of government to another. In other parts of the world, the idea of revolutions in government is, by a mournful and indissoluble association, connected with the idea of wars, and all the calamities attendant on wars. But happy experience teaches us to view such revolutions in a very different light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and of mankind.

Oft have I viewed with silent pleasure and admiration the force and prevalence, through the United States, of this principle—that the supreme power resides in the people; and that they can never part with it. It may be called the *panacea* in politics. There can be no disorder in the community but may here receive a radical cure. If the error be in the legislature, it may be corrected by the constitution; if it be in the constitution it may be corrected by the people. There is a remedy therefore, for every distemper in government, if the people are not wanting to themselves. For a people wanting to themselves, there is no remedy; from their power, as we have seen, there is no appeal; to their error, there is no superior principle of correction. . . .

What is the nature and kind of that government, which has been proposed for the United States, by the late convention? In its principle it is purely democratical: but that principle is applied in different forms, in order to obtain the advantages, and exclude the inconveniences of the simple modes of government.

If we take an extended and accurate view of it, we shall find the streams of power running in different directions, in different dimensions, and at different heights, watering, adorning, and fertilizing the fields and meadows through which their courses are led; but if we trace them, we shall discover, that they all originally flow from one abundant fountain. In this constitution, all authority, is derived from THE PEOPLE.

The Constitution was triumphantly ratified in the face of a determined and strong opposition. But

that opposition decided to express in some way their sense of the wrong they believed had been done them, and they expressed it against those whom they felt had done the most to win this triumph for their opponents, by gathering in the public square of Carlisle, and there burning in effigy, Mr. Wilson and Mr. McKean, who had also been a powerful advocate of the Constitution. It was an act intended to mark both these gentlemen with the brand of the people's disapproval; it serves now to show that of the defenders of the people of Pennsylvania, and of their rights under the Government, these two men were the strongest and most marked for their zeal and ability.

In Philadelphia the adoption of the Constitution was celebrated by a great procession on the Fourth of July, 1788. On that occasion (and it was considered at the time to be one of very great grandeur and dignity), Mr. Wilson was chosen to deliver the oration, which he did with great acceptance. His powers of oratory not only convinced the soberer minds, but by their brilliancy and ease, were suited to the popular character of the celebration. He dwelt at large on all the happy aspects of the occasion; he did not omit to turn the thoughts of the people to higher things than their own material welfare, but he took occasion to impress upon these citizens of the new republic that they could only be fortunate, could only be happy, if they discharged the duties now imposed upon them conscientiously and seriously. He seemed, indeed, to have in mind

the later conditions which were to prevail in the city in which he was speaking when he reminded the electors of their duty: ²⁵

To speak without a metaphor, if the people, at their elections, take care to choose none but representatives that are wise and good, their representatives will take care, in their turn, to choose or appoint none but such as are wise and good also. The remark applies to every succeeding election and appointment. Thus the characters proper for public officers will be diffused from the immediate elections of the people over the remotest parts of administration. Of what immense consequence is it then, that this primary duty should be faithfully and skilfully discharged! On the faithful and skilful discharge of it, the public happiness or infelicity, under this and every other constitution, must, in a very great measure, depend. For, believe me, no government, even the best, can be happily administered by ignorant or vicious men. You will forgive me, I am sure, for endeavoring to impress on your minds, in the strongest manner, the importance of this great duty. It is the first concoction in politics; and if an error is committed here, it can never be corrected in any subsequent process; the certain consequence must be disease. Let no one say, that he is a single citizen; and that his ticket will be but one in the box. That one ticket may turn the election. In battle every soldier should consider the publick safety as depending on his single arm; at an election, every citizen should consider the publick happiness as depending on his single vote.

It was now found necessary to alter the Constitution of the state of Pennsylvania, in order that it might conform to that of the United States. Mr. Wilson again and again, as a matter of course, was a delegate to the convention called for the purpose of

²⁵ Wilson's Works, vol. III, 308, 309. Phila. 1804.

reforming it. Other members were McKean, Lewis, Ross, Addison, Sitgreaves, Pickering, and Gallatin. In this convention Mr. Wilson found himself opposed to his federalist friends, for he desired that the people should elect their senators directly, while his colleagues desired that this should be done through the medium of electors. Here, as always, Mr. Wilson, though accused by his enemies of aristocratical and monarchical ideas, was the advocate of the people; his theory was that all power resided in them, and it was his principle that this power should be expressed as directly as possible. In the people lay the power and they should be aided to wield that power, even though they might sometimes wield it to their own undoing. In describing the dignity of the elector he said:

I cannot sufficiently express my own ideas of the dignity and value of this right; in real majesty an independent and unbiassed elector stands superior to princes, addressed by the proudest titles, attended by the most magnificent retinues, and decorated with the most splendid regalia. His sovereignty is original; theirs is only derivative.

His labors in the previous conventions and the reputation he had now won, made him the most prominent member of this convention. He was one of the committee to prepare the form of the Constitution, and the duty of drawing up that document was placed in his hands.

The Judiciary Act was signed by Washington in September, 1789, and immediately thereafter he sent

to the Senate the names of his appointees for the offices of chief justice and associate justices. Among the latter was that of James Wilson, who is said to have been mentioned for the chief justiceship. He accepted the appointment, and was the fourth of the associate justices to receive his commission. Mr. Wilson had participated in the debates upon the Constitution; had helped to form that instrument; had been its advocate in debate and in the public meetings of the time. If he did not understand the Constitution and the thoughts which were in the minds of the framers, "it is safe to assume that no one outside of the convention did."²⁶

The evidence that he did thoroughly understand the Constitution is complete, voluminous and convincing. That his interpretation was as wide, as far-seeing, as enlightened, as any that has ever been made, has not of late years been remembered as it should be. In his "Considerations on the Power to Incorporate the Bank of North America"; in his arguments before the conventions of which he was a member; in his lectures upon law; and in his speeches and other writings, Mr. Wilson used phrases and made arguments which are to be found repeated in the line of constitutional cases to which belong, *Marbury vs. Madison*, *Fletcher vs. Peck*, *McCulloch vs. Maryland*, *Cohens vs. Virginia*, and the *Dartmouth College Case*. The decisions in these cases have been said to reach the "high water

²⁶ Shirley, *Dartmouth College Causes*, p. 223.

mark of great statesmanship and profound political philosophy.”²⁷ They have been called canons of American jurisprudence; landmarks in constitutional law. It has been said that Marshall’s only light was “the inward light of reason.”²⁸ To him alone has been rendered the credit, the adulation, the sincere, yet too fulsome, praise of generations of men. Yet these men had but to turn to the records, plainly printed, undisputed, open to all, to find that the arguments had been anticipated, the phrases formulated, even before the opinions of the framers of the Constitution had taken final form in that instrument.

In *Marbury vs. Madison*,²⁹ we have the first of these great opinions on the Constitution.³⁰ Mr. Thayer says:

The decision was that the court had no jurisdiction, and that a statute purporting to confer on it power to issue a writ of mandamus in the exercise of original jurisdiction was unconstitutional. . . . The opinion began by passing upon all the points which the denial of its own jurisdiction took from it the right to treat.

Twenty out of twenty-seven of the pages of the decision are thus pure dicta and need not be considered. It is claimed by Professor Thayer that the reasoning on the constitutional points is mainly that of Hamilton, as printed in the *Federalist*, and he considers

²⁷ Dillon, *Life of Marshall*, vol. II, 464. Address of William McNutt.

²⁸ Dillon, *Life of Marshall*, vol. I, 305. Address of LeBaron Colt.

²⁹ 1 Cranch’s Reports, 49.

³⁰ Dillon, *Life of Marshall*, vol. I, 232. Address of Professor Thayer.

that the reasoning does not answer the chief difficulties. Speaking of the opinion he says:

It assumes as a chief feature of a written Constitution what does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of a federal court in disregarding the acts of a co-ordinate department, and in dealing thus with the legislation of the local states; a distinction important in itself, and observed under the written constitutions of Europe, which, as I have said, allow this power in the last sort of cases, while denying it in the other.

Mr. Wilson had studied with great care the written constitutions of Europe as they then existed, and the unwritten constitution of England. In one of his lectures, delivered in 1790, now forming chapter eleven of his collected works, he took up this subject and there, in a comparison of the British constitution with that of America, he not only anticipated all that Marshall was to say in *Marbury vs. Madison*, but his argument avoids the objection that Professor Thayer has made to that of Marshall (or Hamilton). After showing the supreme power of the British Parliament, and quoting Lord Holt,—³¹ “An act of Parliament can do no wrong though it may do several things that look pretty odd,” he cites Blackstone’s remark: ³² “I know of no power which can control the Parliament.” He argues that Blackstone must have meant human power, for the Parliament may, unquestionably, be controlled by natural or re-

³¹ Wilson’s Works, vol. I, 460. Phila. 1804.

³² Wilson’s Works, vol. I, 462. Phila. 1804.

vealed law, proceeding from divine authority. He continues: ⁸³

Is not this authority superior to anything that can be erected by parliament: is not this superior authority binding upon the courts of justice? When repugnant commands are delivered by two different authorities, one inferior and the other superior; which must be obeyed? When the courts of justice obey the superior authority, it cannot be said with propriety that they control the inferior one; they only declare, as it is their duty to declare, that this inferior one is controlled by the other, which is superior. They do not repel the act of parliament: they pronounce it void, because contrary to an over-ruling law. From that over-ruling law, they receive the authority to pronounce such a sentence. In this derivative view, their sentence is of obligation paramount to the act of the inferior legislative power.

In the United States, the legislative authority is subjected to another control, beside that arising from the natural and revealed law; it is subjected to the control arising from the constitution. From the constitution, the legislative department, as well as every other part of government, derives its power; by the constitution,

⁸³ Mr. Wilson then quotes from a speech by Mr. Elias Boudinot, the remarks made by him "in a late debate": "It has been objected, . . . that, by adopting the bill before us, we expose the measure to be considered and defeated by the judiciary of the United States, who may adjudge it to be contrary to the constitution, and therefore void, and not lend their aid to carry it into execution. This gives me no uneasiness, I am so far from controverting this right in the judiciary, that it is my boast and my confidence. It leads me to greater decision on all subjects of a constitutional nature, when I reflect, that, if from inattention, want of precision, or any other defect, I should do wrong, there is a power in the government, which can constitutionally prevent the operation of a wrong measure from affecting my constituents. I am legislating for a nation, and for thousands yet unborn; and it is the glory of the constitution, that there is a remedy for the failures even of the legislature itself." *Wilson's Works*, vol. I, 462, 463. Phila. 1804.

the legislative, as well as every other department, must be directed; of the constitution, no alteration by the legislature can be made or authorized. In our system of jurisprudence, these positions appear to be incontrovertible. The constitution is the supreme law of the land; to that supreme law every other power must be inferior and subordinate.

Now, let us suppose, that the legislature should pass an act, manifestly repugnant to some part of the constitution; and that the operation and validity of both should come regularly in question before a court, forming a portion of the judicial department. In that department, the "judicial power of the United States is vested" by the "people" who "ordained and established" the constitution. The business and design of the judicial power is, to administer justice according to the law of the land. According to two contradictory rules, justice, in the nature of things, cannot possibly be administered. One of them must, of necessity, give place to the other. Both, according to our supposition, come regularly before the court, for its decision on its operation and validity. It is the right and it is the duty of the court to decide upon them: its decision must be made, for justice must be administered according to the law of the land. When the question occurs—What is the law of the land? It must also decide this question. In what manner is this question to be decided? The answer seems to be a very easy one. The supreme power of the United States has given one rule; a subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence the latter is void, and has no operation. In this manner it is the right and it is the duty of a court of justice, under the constitution of the United States to decide.

This is the necessary result of the distribution of power, made by the constitution, between the legislative and the judicial departments. The same constitution is the supreme law to both. If that constitution be infringed by one, it is no reason that the infringement should be abetted, though it is a strong reason

that it should be discountenanced and declared void by the other.

The effects of this salutary regulation, necessarily resulting from the constitution, are great and illustrious. In consequence of it, the bounds of the legislative power — a power the most apt to overleap its bounds — are not only distinctly marked in the system itself; but effective and permanent provision is made, that every transgression of those bounds shall be adjudged and rendered vain and fruitless. What a noble guard against legislative despotism!

This regulation is far from throwing any disparagement upon the legislative authority of the United States. It does not confer upon the judicial department a power superior, in its general nature, to that of the legislature; but it confers upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superior power of the constitution — the supreme law of the land.

Nothing seems to be needed to make this exposition of the supreme power of the Constitution, full and complete. In the last paragraph it would seem that Mr. Thayer's objection to Marshall's decision is answered. The judiciary does not control the legislative; it merely acts in accordance with the Constitution from which both derive their powers, before which both are equal, and to which both must bow.³⁴ The remarks by Mr. Boudinot, quoted in the note, show that no one man can claim any exclusive right to the idea that the judiciary had a revisionary power over the acts of the legislature. During the convention, in the clash of mind with mind, in the necessity

³⁴ See Elliott's Debates, vol. II, 445, 446, 489, where he declares that it is the duty of the judges to declare unconstitutional acts void; for the power of the Constitution dominates.

which drove them to feel after feasible modes of effecting that which they knew they must effect or perish, they took up and left behind, adopted or rejected, debated and argued upon, nearly every point, nearly every scheme, that has since been mooted in the after life of the nation. These arguments, these discussions, were still afloat in the mental atmosphere in Marshall's time, and his quick and fertile mind, took, shaped, and used them, to his own honor and the lasting good of his country. It seems that he, if his character has been properly understood, would be the first to lay a silencing finger upon the lips of those whose adulation has moved them foolishly to assert that he alone, without light or leading, had originated all those ideas which he well knew were the common property of his time.

The decision in *Cohens vs. Virginia*,³⁵ is foreshadowed in the lecture on the Nature of Courts,³⁶ as an examination of the reasoning in that lecture, and the decision itself, will show. In his decision Marshall said:³⁷

They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state in the union; that the constitution, law and treaties, may receive as many constructions as there are states; and that this is not a mischief, or if a mischief, is irremediable. . . . The judicial power

³⁵ 6 Wheaton's Reports, p. 264.

³⁶ Wilson's Works, vol. II, 149, 150. Andrew's edition.

³⁷ 6 Cranch's Reports, 377, 384.

of every well constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

Mr. Wilson, in his lecture, had said in 1791:³⁸

According to the rules of judicial architecture, a system of courts should resemble a pyramid. Its base should be broad and spacious: it should lessen as it rises: its summit should be a single point. To express myself without a metaphor — in every judicial department, well arranged and well organized, there should be a regular progressive gradation of jurisdiction; and one supreme tribunal should preside and govern all the others.

If no superintending tribunal of this nature were established, different courts might adopt different and even contradictory rules of decision; and the distractions springing from these different and contradictory rules, would be without remedy and without end. Opposite determinations of the same question, in different courts, would be equally final and irreversible. But when, from those opposite determinations, an appeal to a jurisdiction superior to both is provided, one of them will receive a sentence of confirmation, the other of reversal. Upon future occasions, the determination confirmed will be considered as an authority; the determination reversed will be viewed as a beacon. . . .

"Ampliare jurisdictionem" has been a principle avowed by some judges: it is natural and will operate when not avowed. It will operate powerfully and irresistibly among a number of co-ordinate and independent jurisdictions; and without a tribunal possessing a control over all, the pernicious and interfering claims could neither be checked nor adjusted. But a supreme court prohibits the abuse and protects the exercise, of every inferior judiciary power.

In France, before the present revolution, the establishment of a number of parliaments or independent tribunals produced,

³⁸ Wilson's Works, vol. II, 290. Phila. 1804.

in the different provinces, a number of incongruous and jarring decisions. This has been assigned, and with much apparent reason, as the great source of that diversity of customs and laws, which prevailed, to an uncommon degree, in the different parts of the kingdom of France, in other respects so well compacted. . . . In the United States and Pennsylvania — for here we must take the two constitutions in a collected view — a fine and regular gradation appears, from the justices of the peace in the commonwealth, to the supreme court of the national government.

But it is in the “Considerations on the Power to Incorporate the Bank of North America”³⁹ that we find the greatest of all the arguments upon constitutional law—arguments clearer, more forcible, more logical, than those found in the whole course of our decisions, or those of our writers upon the law of the Constitution. The question which Mr. Wilson had before him arose before the adoption of our present constitution. He had, in the phraseology of the Articles of Confederation, more to contend against, than he would have had if the similar, but slightly amended language of the Constitution of 1787 had been before him.⁴⁰

In reading Marshall’s opinion in *McCulloch vs. Maryland*, the impression given is that Marshall’s mind is laboring with a difficulty that it is not sure it is overcoming. We feel, in reading Wilson’s argument that he finds no logical impediment to the

³⁹ Wilson’s Works, vol. III, 397–427.

⁴⁰ The word “expressly” had been eliminated from the later document, and Marshall himself seems to experience some relief at this fact. See 4 Wheaton’s Reports, 406, 407.

conclusion he is reaching. The "Considerations" do not form a lengthy document; they should be read in their entirety to be rightly judged, but a few phrases from the decision in *McCulloch vs. Maryland*, and from Wilson's argument, may serve to show how the two great minds treated the same subject. These extracts merely indicate, they cannot reveal, the "irresistible logic" of the finished performance. The attitude taken by Mr. Wilson is very broad, and needs no extension to admit of the exercise by the national government, of all the powers since claimed by it, or declared by the courts to adhere to it, up to the period of the Spanish War. At the same time it does not look to any infringement of the rights of the states, for Mr. Wilson always retained a strong attachment for the separate state governments, believing that only by the federal system could such a nation as that he saw rising around him, be enabled to govern itself and maintain its existence.

The question before the two men was similar, as they themselves stated it. Marshall answered the question, "Has Congress power to incorporate a bank?" Wilson answered the question, "Had the United States in Congress assembled a legal and constitutional power to institute and organize the Bank of North America?" In answering these questions they found it necessary to examine the Constitution in regard to what are now known as the "implied powers." Marshall in his decision in *McCulloch vs. Maryland*, an opinion which is considered by

most of his biographers the best opinion on constitutional law ever delivered, says: ⁴¹

Though one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act must necessarily control its component parts. . . . In America the powers of sovereignty are divided between the government of the union, and those of the states. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. . . . We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional. . . . We cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government.

In his "Considerations" Mr. Wilson answers the question which he had to answer in this manner: ⁴²

The objection under this head will be that by the second article of the confederation, "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right,

⁴¹ 5 Wheaton's Reports, 410, 411, 421.

⁴² Wilson's Works, v. III, 397-427. Phila. 1804.

which is not, by the confederation, *expressly* delegated to the United States in Congress assembled."

If, then, any of the states possessed, previous to the confederation, a power, jurisdiction, or right, to institute or organize, by a charter of incorporation a bank for North America; in other words, commensurate to the United States; such power, jurisdiction, and right, unless expressly delegated to Congress cannot be legally or constitutionally exercised by that body.

But, we presume, it will not be contended, that any or each of the states could exercise any power or act of sovereignty extending over all the other states, or any of them; or, in other words, incorporate a bank, commensurate to the United States.

The consequence is, that this is not an act of sovereignty, or a power, jurisdiction, or right, which, by the second article of the confederation, must be expressly delegated to Congress, in order to be possessed by that body. . . .

Though the United States in Congress assembled derive *from the particular states* no power, jurisdiction, or right, which is not expressly delegated by the confederation, it does not thence follow, that the United States in Congress have *no other* powers, jurisdiction, or rights, than those delegated by the particular states.

The United States have general rights, general powers, and general obligations, not derived from any particular state, nor from all the particular states, taken separately; but resulting from the union of the whole. . . .

To many purposes, the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties, by the law of nations incident to such.

Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature. The purchase, the sale, the defense, and the government of lands and countries, not within any state, are all included under this description. An institution

for circulating paper, and establishing its credit over the whole United States, is naturally ranged in the same class.

The act of independence was made before the articles of confederation. This act declares that "these United States (not enumerating them separately) are free and independent states; and that, as free and independent states, *they* have full power to do *all* acts and things which independent states, may, of right, do."

The confederation was not intended to weaken or abridge the powers and rights, to which the United States were previously entitled. It was not intended to transfer any of these powers or rights to the particular states, or any of them. If, therefore, the power now in question was vested in the United States before the confederation, it continues vested in them still. The confederation clothed the United States, with many, though perhaps not with sufficient powers; but of none did it disrobe them.

It is no new position, that rights may be vested in a political body, which did not previously reside in any or all the members of that body. They may be derived solely from the union of those members. "The case," says the celebrated Burlamaqui, "is here very near the same as in that of several voices collected together, which, by their union, produce a harmony, that was not to be found separately in each."

Much has been claimed for this argument,⁴³ but it does not seem that it has been too much. It covers all the ground that has since been taken, and is more definite in its attitude than any that has been put forth

⁴³ "In these two sentences is found the gist of all the arguments in favor of the incidental or implied powers so called of the government. . . . The national banking system, the legal tender acts and the acquisition of national territory by peaceful means are all clearly within the argument of our author. No less power than that claimed in this argument will sustain such powers. The statement of the proposition by Wilson is clearer in one particular than the

later. Some of the phrases have a familiar sound, and it may be that Marshall's mind had retained them, since he was familiar with the debates upon the incorporation of the bank, which had been widely diffused, and which had greatly influenced the public mind.

It was in this same pamphlet that the argument in *Fletcher vs. Peck* was also anticipated. Mr. Wilson was arguing against the repeal of a charter which the legislature had granted to the Bank of North America. He did not believe that it would be wise or politic to revoke the charter. He argued that the act in question formed a charter of compact between the legislature of the state, and the president, directors, and company of the Bank of North America.

In pursuing his argument he said:

It may be asked — Has not the state power over her own laws? — May she not alter, amend, extend, restrain, and repeal them at her pleasure?

I am far from opposing the legislative authority of the state; but it must be observed, that according to the practice of the legislature, public acts of very different kinds are drawn and promulgated under the same form. A law to vest or confirm an estate in an individual — a law to incorporate a congregation or other society — a law respecting the rights and properties of all the

statement by any other person whose language the editor has been able to discover. Where the power is not within the power of the state, and is within the general object for which the general government was created he finds no trouble of sustaining the use of any legitimate means to exercise the power which might be exercised by any sovereign nation." Andrews, *Wilson's Works*, vol. I, 558, 559. Andrew's Edition.

citizens of the state — are all passed in the same manner; are all clothed in the same dress of legislative formality; and are all equally acts of the representatives of the freemen of the commonwealth. But surely it will not be pretended, that, after laws of those different kinds are passed, the legislature possesses over each the same discretionary power of repeal. In a law respecting the rights and properties of all the citizens of the state, this power may be safely exercised by the legislature. Why? Because, in this case, the interest of those who make the law (the members of the assembly and their constituents) is the same. It is a common cause, and may, therefore, be safely trusted to the representatives of the community. None can hurt another without, at the same time, hurting himself. Very different is the case with regard to a law, by which the state grants privileges to a congregation or other society. Here two parties are instituted, and two distinct interests subsist. Rules of justice, of faith, of honor, must, therefore, be established between them; for, if interest alone is to be viewed, the congregation or society must always lie at the mercy of the community. Still more different is the case with regard to a law, by which an estate is vested or confirmed in an individual: if, in this case, the legislature, may, at discretion, and without any reason assigned, divest or destroy his estate, then a person seized of an estate in fee simple, under legislative sanction, is, in truth, nothing more than a solemn tenant at will.

For these reasons whenever the objects and makers of an instrument passed under the form of a law are not the same, it is to be considered as a compact, and to be interpreted according to the rules and maxims by which compacts are governed. A foreigner is naturalized by law: is he a citizen only during pleasure? He is no more, if, without any cause of forfeiture assigned and established, the law, by which he is naturalized, may at pleasure be repealed. To receive the legislative stamp of stability and permanency acts of incorporation are applied for from the legislature. If these acts may be repealed without notice, without accusation, without hearing, without proof, without forfeiture;

where is the stamp of their stability? Their motto should be "levity." If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, a precedent will be established for repealing, in the same manner, every other legislative charter of Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will never be wanting on any future occasion. Those acts of the state, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politics, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction.

From the first moment of our original confederation to the last moment of our constitutional history, there has been one problem of unfailing interest, of vital moment—a problem which was nearly fatal to the Constitution in the Convention, which nearly prevented the ratification of it by the states, and which ultimately led to a contest of state with state that convulsed the whole country for years, seeming for a time to sever the bonds which for seventy years had held those states together as one nation. In this union of states, where was the supreme power to reside? What was to become of state sovereignty? How were the rights of state and nation to be equably adjusted?

In the Federal convention Wilson had spoken upon this point and had shown that he desired a strong central government, but that he also desired that the state governments should continue. He believed that the Constitution guaranteed the continued existence of the states, and he went into the ratifying

convention prepared to uphold that idea. In that convention, however, he was called upon to go much farther in defining the relation of the states to the Federal union. The enemies of the Constitution declared that the states were about to be robbed of their power; that a "consolidated government" was about to be established which would deprive the states of nearly all their prerogatives, and, possibly, of their very existence. It was in reply to these strictures that Mr. Wilson, in the debate of December first, said:

Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, that the sovereignty resides in the people. They have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare. This constitution stands upon this broad principle. . . . When the principle is once settled that *the people* are the source of authority, the consequence is that they may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that they will be productive of more good. They can distribute one portion of power to the more contracted circle called state governments; they can also furnish another proportion to the government of the United States. Who will undertake to say as a state officer that the people may not give to the general government what powers and for what purposes they please? How comes it, Sir, that these state governments dictate to their superiors?—to the majesty of the people? When I say the majesty of the people, I mean the thing, and not a mere compliment to them. . . . The truth is, and it is a leading principle in this system, that not the states only but the people

also shall be represented. . . . I have no idea that a safe system of power in the government, sufficient to manage the general interest of the United States, could be drawn from any other source or vested in any other authority than that of the people at large, and I consider this authority as the rock on which this structure will stand.

December fourth, while continuing his task of answering objections to the Constitution, he again encountered the objection that the supporters of the Constitution were endeavoring to introduce a consolidating and absorbing government. His reply was still more definite and assured in tone. He repeated in a few words the argument which he made on the former occasion, and added:

It has not been, nor I presume, will it be denied, that somewhere there is, and of necessity must be, a supreme, absolute and uncontrollable authority. . . . I had the honor of observing, that if the question was asked, where the supreme power resided, different answers would be given by different writers. I mentioned that Blackstone will tell you, that in Britain it is lodged in the British parliament; and I believe there is no writer on this subject on the other side of the Atlantic, but supposes it to be vested in that body. I stated further, that if the question was asked, some politician, who had not considered the subject with sufficient accuracy, where the supreme power rested in our governments, would answer, that it was vested in the state constitutions. This opinion approaches near the truth, but it does not reach it; for the truth is, that the supreme, absolute and uncontrollable authority *remains* with the people. I mentioned also, that the practical recognition of this truth was reserved for the honor of this country . . . His position [Findley's] is that the supreme power resides in the states, as governments; and

mine is, that it *resides* in the PEOPLE, as the fountain of government; that the people have not — that the people mean not — and that the people ought not, to part with it to any government whatever. . . . I agree with the members in opposition that there cannot be two sovereign powers on the same subject.

I consider the people of the United States as forming one great community, and I consider the people of the different states as forming communities again on a lesser scale. . . . Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the states as made *for* the people as well as *by* them, and not the people as made for the states. . . . My position is, Sir, that in this country the supreme, absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the state governments, but that the fee simple continues, resides and remains with the body of the people.

The “principle” on which this system was constructed was, as interpreted by Wilson, not that of either party to the controversy. One side contended then, as it has ever since contended, that sovereignty resides in the states; the other contended, as it has contended ever since, that the Union alone is sovereign. Mr. Wilson was right in saying that in this way the system could never be comprehended. He did not attempt to untie the metaphysical knot. He cut it. With the same sureness of mental touch with which he brushed aside the vexing technicalities in regard to the implied powers, he found the cord, which once severed, left an untangled skein. Had he been able to carry out the plans of his later life, and digest the laws of the nation in connection with

a digest of laws of the state of Pennsylvania, marking out, as he hoped to do, the lines which demarcate the boundaries between the powers of the states and of the nation, it may not be too much to say that he would have brought his theory so plainly before the people that they might have been saved from holding opposing views until those views could no longer be reconciled by an appeal to reason.

As the legislatures have had to protect themselves against the consequences of the decision in the Dartmouth College Case,⁴⁴ so have they been obliged to

⁴⁴ Wilson was much quoted and relied upon by Shirley in his book on the Dartmouth College Causes (p. 216). Mr. Hunter in his argument in the case of *Sturges vs. Crowninshield* (4 Wheaton's Reports, 151), said of the words "obligation of contracts:" "They were not taken from the English common law, or used as a classical or technical term of our jurisprudence in any book of authority. No one will pretend that those words are drawn from any English statute, or from the states' statutes before the adoption of the constitution. Were they then furnished from that great treasury and reservoir of rational jurisprudence, the Roman law? We are inclined to believe this. The tradition is that Mr. Justice Wilson, who was a member of the convention, and a Scottish lawyer, and learned in the civil law, was the author of this phrase."

In the Dartmouth College Causes of Shirley, the authority of Mr. Wilson is used, not to support, but to controvert, the opinions of Judge Marshall. Mr. Shirley wrote his book to prove that Marshall's attitude in his decision in the Dartmouth College Case was wrong. He believed that Mr. Wilson's views, as he understood them, were correct, and he had a very strong admiration for Mr. Wilson. He says, in the short sketch of Wilson's life that he inserts in his work on the College Cases, "he" (Wilson) was in favor of a strong central government, as were his colleagues, Gouverneur Morris, and Hamilton; but they differed very much in their views. Hamilton regarded the British government as the proper model, but Judge Wilson did not; he proposed to build anew from the foundation, while preserving the autonomy of the states.

find a way out of the difficulties they themselves made in overriding the decision of Mr. Wilson in *Chisholm vs. Georgia*,⁴⁵ for as a recent writer has pointed out:⁴⁶

While we cannot directly sue a sovereign state, the lawyers forced by the exigencies of a decent equity, have provided for suing officers of government whose costs and penalties the states, and even the United States, now freely pay out of the taxes.

It was for a "decent equity" that Mr. Wilson contended, saying:

"A state, like a merchant, makes a contract; a dishonest state, like a dishonest merchant, wilfully refuses to discharge it; the

In his lectures to the law school upon the "general principles of law and obligation," etc., prepared within a year after the Federal constitution went into operation, he criticises Blackstone's definition of municipal law and its "obligation," with a severity scarcely equalled by Austin and his admirers, at a later day, upon other points. With Wilson all forms of government and all laws were "contracts." He says, "We find that an act which, considered indistinctly and dignified by the name of law, requires the whole supreme power of a nation to give it birth is, when viewed more closely and analysed into the component parts of its authority properly arranged under the class of contracts. It is a contract to which there are three parties; those who constitute one of the three parties, not acting even in public characters." . . . In his lectures he says of the common law: "It prescribes the manner and the obligation of contracts, wills, deeds, and even acts of parliament are interpreted." (Wilson's Works, 205. Philadelphia 1804.)

It seems to us from the debates in the Convention, the views of Judge Wilson, and those of other eminent authorities to which we have referred, that the framers of the constitution had this meaning in mind when they adopted the provision. An interpretation which would restrict the provision to executory contracts would be much more natural and reasonable than the other." Shirley, *Dartmouth College Causes*, pp. 220, 221, 227.

⁴⁵ 2 Dallas Reports, 419.

⁴⁶ Kellogg, Lippincott, vol. LXIII, 245.

latter is amenable to a court of justice. Upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice by declaring, 'I am a sovereign state?' Surely not."

In this case, the verdict of time has been with Wilson, while in the earlier cases Wilson's argument was broad enough in principle to cover phases of national development which were later to come up for adjustment.⁴⁷ Mr. Wilson believed that the Constitution must be founded on principles that would "expand with the expansion, and grow with the growth of the United States."⁴⁸

He was the deepest and clearest expounder of such principles.

In the debates of the constitutional convention, in his public speeches, in his legal work, Mr. Wilson had shown himself learned, not only in the common law, but, what was a rarer qualification at that time in this country, learned in the civil law. When the College of Philadelphia decided to found a professorship of law, it was to this citizen of Philadelphia, the acknowledged leader of the bar of their city, that the trustees looked for their professor. Mr. Wilson accepted the offer, and as the college was soon afterwards united with the University of Pennsylvania,⁴⁹

⁴⁷ The Legal Tender Cases, for example. See Wilson's Works, vol. I, 556, 559. Andrew's Edition. Note 2, by the editor.

⁴⁸ Elliott's Debates, vol. V, 262.

⁴⁹ The rights and properties of the college had been confiscated by the legislature in 1779, and bestowed upon a new organization called

he thus became the first professor in law of that University. Upon accepting the appointment he resigned the office of Trustee which he had held since 1779.

The first lecture was delivered in the winter of 1790. We have had the occasion painted for us in picturesque language by a number of writers. The setting for the picture was the large hall of the old Academy of Philadelphia, where Mr. Wilson had once been an instructor. General Washington and the "republican court" were there in the dignified dress of the time, and Mr. Wilson speaks of his embarrassment in finding his plain law lecture an occasion of so much interest to both sexes. "The lecture was replete with classic references and graceful thoughts, and at the University Commencement which followed, the degree of Doctor of Laws was conferred upon its learned author." That lecture was followed by others during the remainder of the winter, and a second course was begun the following year, but soon ceased. The reason for the cessation is not known, but it is probable that the time was not ripe for a sustained effort of this kind; the training received in a law office being then held sufficient to prepare for the work of the bar, and also thought to be of a more practical nature. Mr. Wilson had ventured to criticise Blackstone, and it may have been

"The Trustees of the University of the State of Pennsylvania." Ten years later these rights were restored, and in 1791 an Act was passed amalgamating the old college with the new University. University Bulletins. Sixth Series, No. 2, Part 2.

thought that a man whose opinions were so well received in England as Judge Blackstone's must, of necessity, be wiser than any American lecturer. The influence of England in the world of thought was still too strong for mere merit to make head against it. An editor of Blackstone, Mr. Hammond, expresses surprise that Blackstone's definitions should be so generally received, and this exposition of Judge Wilson's remain in oblivion.⁵⁰

The surprise expressed by Mr. Hammond grows as one reads these lectures. Luminous, logical, sustained by a depth of learning not common at any period, they carry the reader along with their clear simplicity of diction, so that one leaves off with regret at passing out of an intellectual atmosphere so exhilarating and elevating. Could the lecture on Law and Obligation be read each year as an opening lecture before the incoming class of every law school in the United States; could its principles be impressed upon the mind of each student in every such school, the benefit to the student himself and to the world into which he will afterwards enter, would be incalculable. The false premises and insincere logic of Blackstone would be supplanted by the well-taken premises and irresistible logic of Wilson. The criticism of Blackstone's definition of law has become famous. Such English writers as Austin and Dicey have approved the view taken by Wilson, but still the American student is set to study and absorb the

⁵⁰ Hammond's Blackstone, vol. I, 113.

doctrines of absolutism and even of despotism, which Wilson showed to be defended by the Vinerian professor.

Of the remaining lectures, those on the Common Law, the Nature and Philosophy of Evidence, the Comparison of Constitutions, the Judicial Department, and that on Corporations, may perhaps be the more noteworthy. In the lecture on Corporations, Mr. Wilson's prevision of future events is shown to a remarkable degree. He describes a corporation as: ⁵¹

A person in a political capacity is created by the law, to endure in perpetual succession. Of these artificial persons a great variety is known to the law. They have been formed to promote and to perpetuate the interests of commerce, of learning and of religion. It must be admitted, however, that, in too many instances, these bodies politic have, in their progress, counteracted the design of their original formation. Monopoly, superstition and ignorance have been the unnatural offspring of literary, religious, and commercial corporations. This is not mentioned with a view to insinuate, that such establishments ought to be prevented or destroyed: I mean only to intimate that they should be erected with caution, and inspected with care.

He could hardly have uttered a stronger warning had he foreseen the over-development of the corporate power which was to take place in the coming century.

These lectures were published in three modest volumes, where they stand as given to the world by Mr.

⁵¹ Wilson's Works, vol. II, 265, 266.

Wilson's son, Mr. Bird Wilson, in 1804. They had not the benefit of a revision by the author, who died six years before their publication. Mr. Wilson had contemplated publishing them, but in the spring of 1791, the Pennsylvania house of representatives unanimously resolved to appoint him to revise and digest the laws of the commonwealth; to ascertain how far any British statutes extended to it; and to prepare bills, containing such alterations, additions and improvements as the code of laws, and the principles and form of the new state constitution might require. His letter to the speaker of the House of Representatives, written August 24, 1791, shows how fully he felt the importance of the duty laid upon him, and the vast amount of care and labor it would involve. It also sheds much light upon the extreme carefulness with which he entered upon any work which he was to do; the minute attention he gave to each detail, to each minor point, entailing much that would be considered drudgery today, and which could be given only at a vast expense of time and strength. The letter also shows that with all this attention to detail and minutiae, Mr. Wilson could take the widest view of the same subject that had just been submitted to this keen scrutiny. No work he undertook seems to have been a matter of mere business to him, and he even idealized the drudgery of digest making; he loved the law, and he meant to make it beloved by others. He shows that his choice of a literary style on such work was well considered.

If youth should be educated in the knowledge and love of the laws, it follows, that the laws should be proper objects of their attachment, and proper objects of their study. Can this be said concerning a statute book drawn up in the usual style and form? Would any one select such a composition to form the taste of his son, or to inspire him with a relish for literary accomplishments? It has been remarked, with truth as well as wit, that one of the most irksome penalties, which could be inflicted by an act of parliament, would be, to compel the culprit to read the statutes at large from the beginning to the end.

But the knowledge of the laws, useful to youth, is incumbent on those of riper years.

From the manner in which other law books, as well as statute laws, are usually written, it may be supposed that law is, in its nature, unsusceptible of the same simplicity and clearness as other sciences. It is high time that law should be rescued from this injurious imputation. Like the other sciences, it should now enjoy the advantages of light, which have resulted from the resurrection of letters; for, like the other sciences, it has suffered extremely from the thick veil of mystery spread over it in the dark and scholastic ages.

It was this task of rescuing his beloved science from the injurious reputation which had rested upon it, that prevented him from seeing his lectures in print; but it is in those lectures that he did give to it those "advantages of light" which have resulted from the resurrection of letters, even though they lost the benefit of that final revision which every author must desire for the work of his brain.

The work of arranging the laws which Mr. Wilson had undertaken with such devotion was never to be accomplished. The two branches of the legisla-

ture failed to agree; provision for pecuniary compensation for the work was never made; the necessary books were to be obtained only with great difficulty; and the enterprise as a public undertaking had to be given up. Mr. Wilson, however, still continued to devote much time and labor to the work which he felt to be so essential. He had hoped to publish it under his own name, and there is evidence that he had planned to extend the scope of the work, making it not only a state but a national digest, but he did not live to see this hope fulfilled.

In April, 1776, Mr. Wilson had met with a great grief in the loss of his wife. The six children of the marriage survived Mrs. Wilson, and one, Bird Wilson, was, as has been mentioned, the editor of the first edition of the works of his father. Some years after the death of his first wife, Mr. Wilson contracted a second marriage. Miss Hannah Gray, who was the daughter of Mr. Ellis Gray, a merchant of Boston, became his second wife, and survived him for some years. The only son of this marriage died in infancy.

As was customary at that time, Mr. Wilson received students in his law office. Among those whom he received were Bushrod Washington and Samuel Sitgreaves. President Washington himself was instrumental in sending his nephew to study under Mr. Wilson, as he had a very high opinion of Mr. Wilson's abilities and character.

It has been said that Mr. Wilson was more a man

of books than of the world. Perhaps for this reason his financial affairs were not always in a sound state. He entered into the great land speculation of the time, known as that of the "Yazoo Land Companies," and is said to have owned shares to a very large amount. The failure of this speculation involved him deeply in debt, and the distress of mind necessarily caused to so sensitive a spirit by such a situation, may have hastened his death, which occurred while he was still in middle life. From the amount of work which he had done; from the grave and dignified style of his writings; from the learning he displayed; from the evidences of a wisdom no learning can bestow, and which usually only comes from a long experience, we are accustomed to think of him as an old man, who died in the fullness of years. In fact he was only fifty-six years of age when he died; a man, who, it seemed, had a large part of his life before him, whose work, great as it was, had not been finished. He was in the active exercise of his judicial duties, being on circuit in North Carolina, when attacked by his fatal illness. He died on the 28th of August, 1798, at the home of his old friend Iredell, in Edenton, North Carolina. There he was laid to rest, far from the scenes of his active life, farther still from the land of his birth. But no place in America could be an alien spot to James Wilson; he had given his best gifts to the making of a united country, and any place in that country where he might find his final rest would

honor him as one of the greatest of those who had participated in this work.

To set down simply the facts of the life of James Wilson, as has here been done, is to write a eulogy. It is impossible that it should be otherwise. The petty politicians who spoke of him as "Caledonian James," who thought of him as an aristocrat, may have been sincere; time has shown that they were mistaken. The people who besieged him in his house, who burned him in effigy, were doubtless sincere; but the words, the acts, for which they blamed him are those for which a whole people must now reverence him. Of his life as a private citizen we have but a short and simple record. Dignified, upright, honorable, he lived among the people of his chosen country, a model citizen. A certain simplicity, which is said to have been a prominent element of his character, and which at times was the cause of pleasantries at his expense among his friends, is apparent in his writings, and to it those writings owe a peculiar charm; that charm which, in literature, as in life, is most inexplicable yet most potent. This simplicity seems to have been the keynote of his character. It enhanced the beauty of a dignified domestic life, increased the weight of his influence as a sincere and upright citizen, and illuminated his whole course as a statesman. To such a mind there could be no concealment for personal ends, no duplicity of action, no insincerity in its intellectual expositions. To this simplicity, born of sincerity, was

added an enthusiasm for that which he, after profound study, conceived to be right—an enthusiasm which seems never to have faltered, never to have diminished, but to have gone on burning with a steadier glow through all his life. That life, devoted to high ends, directed by deep moral purpose, intensely human, yet interfused with those high qualities which blend the human with the divine, was lived in a time in which its energies had a scope for good which even he, with all his prophetic insight, his belief in the great things to be, could not foresee. He lives in those great writings under whose influence we live today, and his mind still dominates our minds, as he dominated the better spirits of his own time, and it is well that they were so dominated then, and that we are now so dominated.⁵²

⁵² Since this article was written, through the efforts of a Committee representing the various legal organizations in Pennsylvania and the University of Pennsylvania, the remains of James Wilson have been transferred from Edenton, North Carolina, to Christ Church Yard in the city of Philadelphia. The remains arrived in Philadelphia on board the U. S. S. *Dubuque* on Wednesday, November 21st, and were taken to Independence Hall, the scene of Wilson's greatest triumphs, where they lay in state. On Thursday, November 22nd, the Chief Justice of the United States and Associate Justices of the Supreme Court, representatives of the Federal Government and of the Governments of Pennsylvania and the City of Philadelphia, as well as representatives from the American Bar Association and a large number of other legal and patriotic associations, accompanied the remains to Christ Church where appropriate services were held, Hampton L. Carson, the Attorney General of Pennsylvania, delivering the oration.—Ed.

WILLIAM PATERSON.

· WILLIAM PATERSON

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WILLIAM PATERSON.

1745-1806.

BY

CORTLANDT PARKER,

of the New Jersey Bar.

IT is a fact, worthy of notice as an illustration of the ingratitude ascribed to republics, that notwithstanding the pride our nation takes in its Constitution, its reverence for it as a compendium of political wisdom; notwithstanding that respect, if not reverence, is entertained for it by all civilized peoples; notwithstanding that its formation undoubtedly set in motion the wheels of political progress; notwithstanding that our government, through its influence, has actually become the exemplar, not only of the Christian world, but is the pattern after which Japan, and even China, are seeking to frame theirs, the men who created this miracle of political wisdom, are scarcely at all remembered—and those of them whose strong sense and statesmanlike skill did most to bring the great result about, are equally neglected. Even our successful fighting men are frequently forgotten by later generations. Only the most conspicuous, such as Washington and Grant, are very famous. It is not so in England or France. Chatham, Pitt, Fox, Burke, Sheridan,

Wilberforce, and other statesmen, seem immortalized. But the statesmen who actually framed the Constitution of the United States, who introduced and successfully advocated the specialties of its scheme; those who have given it the safety and force it has attained, are all but forgotten.

Such is the fate of William Paterson of New Jersey. A few lawyers in the State of which he was a citizen know of him. These are among the elders of the profession. He has not a statue anywhere. His portrait, painted long after his death by a family friend, and presented by his family, hangs in the halls of Princeton College, where he graduated. Yet, beyond all question, he was of all of his day and generation the most useful and most respected man in New Jersey. It is a pleasing duty to sketch his life, in the hope that generations to come may have that reverence for his name which it deserves.

The time and place of his birth were both, till lately, unknown. Manuscripts once in the possession of his grandson of the same name, a Judge of the Court of Errors and Appeals of New Jersey, now unfortunately burned, contained a statement in his own handwriting that he was born in Antrim, Ireland, on the 24th day of December, 1745, and was the eldest child of his parents. His father's name was Richard. Six years after the family had become residents of the village or hamlet in the surrounding forest in New Jersey, the seminary of learning established a few years before at Newark,

then numbering under a thousand inhabitants, was removed to Princeton. He was the companion in College of Oliver Ellsworth, Luther Martin, Benjamin Rush, Tapping Reeve, Pierpont Edwards, James Madison, Ewing Bedford, Henry Lee and Aaron Burr. The students of Princeton at that date, exhibited a strong taste for forensic discussion. Paterson and Ellsworth, with some of the others above named, founded the Cliosophic Society, known first as the Well Meaning Club, while Madison and others founded the opposition club, first named the Plain Speaking Club, and afterwards the American Whig Society, names in which their members respectively rejoice. In these societies these future statesmen unconsciously prepared themselves for the great tasks which lay before them. Paterson, upon graduating, on September 27, 1763, immediately began the study of the law under the tutelage of Richard Stockton (an alumnus of the first class which went from the college of New Jersey), and a leader of the Jersey bar. Paterson was admitted to the bar November, 1767. He became a Counsellor November, 1771. His rise at the bar, though rapid, was not pecuniarily successful. He began practice in Hunterdon County, a strictly farming precinct. That his ability was appreciated is proved by the fact that on May 23, 1775, he was a member and was appointed secretary of a prominent convention, called because of opposition to the Crown, and afterwards was secretary of the conven-

tion, which on July 2, 1776, adopted a constitution for the State of New Jersey. By the adoption of this constitution, New Jersey rebelled against Great Britain before the Declaration of Independence.

The Constitution, constructed by the Convention, demands a brief notice. It was modelled skilfully, yet curiously, on the British constitution. The Legislature was composed of two houses, a Council and an Assembly. Both were elected by the people. The Council, answering to the House of Lords, was composed of one member for each county; the Assembly had three. The Legislature, in joint meeting, elected the Governor, who held office for one year, and all other officers. The judges of the Supreme Court held office seven years; judges of inferior courts and the Attorney-General, for five years. A Court of Appeals, the last resort in all causes, was created, composed of the Council, together with the Governor, who was also the Chancellor.

Like the British Government, the Legislature was omnipotent, and the Legislature represented the people. For the right to vote and the right to a seat in the Legislature, possession of a small amount of property was necessary. Governors, being Chancellors, and Presidents of the Court of Appeals, had to be lawyers, a provision which gave the State always a good and clever lawyer for its chief executive officer. Less than two days were employed by the committee in framing this constitution; less than six by the convention in discussing and adopting it.

Yet it remained in force till 1844—sixty-eight years, longer than many constitutions adopted after much deliberation.

The concluding clause of the constitution provided that, "It is the true intent and meaning of this Congress that if a reconciliation between Great Britain and these colonies should take place, and the latter be again taken under the protection and government of Great Britain, this charter shall be null and void, otherwise to remain firm and inviolable." Mr. Paterson voted for the adoption of the constitution. A motion was then made to defer printing it so as to reconsider the final clause. The motion failed, though two lawyers besides himself were earnestly for it. The incident has been mentioned as it illustrates his views on the war, then in its initial stages.

Who gave form to this Constitution, is unknown. Prudence probably kept the name of the author secret. It bears internal evidence of being drawn by a lawyer. That this lawyer was in all probability Paterson, is shown by the peculiar characteristics of the instrument—the singular but successful effort to make it like that of the British Crown in effect, yet with the people as rulers, electing an executive in place of the King. The fact, moreover, that he was secretary of the convention and immediately after was made attorney-general, is significant. The destruction by fire, previously mentioned, of all, or almost all, his letters and papers, only a year or two

ago, renders it impossible to learn the truth as to this or much else of his history in this stage of his life.

Paterson was appointed Attorney-General in September, 1776, only two months after the constitution was formed, and held office till June, 1783, or during the whole war. It was a post of much responsibility and danger. His residence all the while was near Princeton, and in the territory of the war.

Paterson was not a warrior, but he was a busy and useful officer of the new State for the seven years of the conflict which closed in independence. During this period he married. His wife was a daughter of the Patroon, Van Rensselaer, at Albany. They had a son and a daughter. The son married and was the father of twin boys; one, named Stephen Van Rensselaer, possessed much literary taste and ability as a writer; his brother, a lawyer, was for one term of five years, one of the so called lay judges of the New Jersey Court of Appeals. Mr. Paterson's daughter died childless. His wife died before him and he married again.

He was active in promoting the movement which led to the convention that framed the Constitution of the United States. Virginia gave the first official suggestion of this convention by resolution of its legislature in January, 1786. New Jersey followed in March by accepting the invitation of Virginia to send delegates to a convention. Annapolis was selected as the place for the convention, which met there in the

September following. Only five states were represented, four of those, regarded as states of lesser magnitude. The meeting took no action of consequence, except to call another convention at Philadelphia, in the following May. This second meeting likewise produced no effect, except to suggest another. At last the legislature of New York, by a majority of one vote, instructed its delegates in Congress, to move for a convention to meet in Philadelphia. This motion passed. To this convention New Jersey sent Mr. Paterson as one of its commissioners. He attended and took much part in the proceedings.

Aside from many important provisions upon minor subjects, there soon sprang up a contest in the Convention between contending opinions upon one subject, which excelled all others in importance. The decision upon this subject, in fact, created the difference between our government and every other successful Republic. Mr. Randolph of Virginia suggested in the form of a resolution a simple national government. This was called the Virginia Plan. The other, introduced, and mainly, at first, supported by Mr. Paterson, was called the New Jersey Plan. The Virginia plan may be described as the creation of an elective limited monarchy. The New Jersey plan was an improved confederacy. The New Jersey plan insisted upon the equality of the smaller states with the larger ones. The Virginia plan aimed at giving the states in the proposed government power proportionate to their population.

Though Mr. Randolph not only proposed, but supported, his plan in debate, Alexander Hamilton, a delegate from New York, and almost, if not quite, the youngest man in the convention, was its chief champion. Mr. Paterson threw himself into the struggle with remarkable energy, persistency, and skill.

There was likeness in the history of these men. Both were born abroad. Both were of Scotch descent. Both struggled in early life with poverty. Both were little educated till comparatively late in school life. Both were remarkable for elevation of character. Here the parallel ends. Paterson, always a civilian, was a studious, plodding lawyer, and only incidentally a statesman. Hamilton was principally a statesman, and rather incidentally, than directly, the lawyer. Hamilton, as a lawyer, was especially noted as an advocate. Paterson, though an advocate of no mean ability, was especially a legal student and scholar. His forte was learning and exactness; he made no pretension to oratory, but spoke always with careful preparation, and mostly from manuscript. Hamilton was a man of genius, though his good sense led him always to depend upon labor. Paterson owed less to nature, and through labor sought and attained excellence.

The peculiarities of Paterson may be seen in his course in the convention. He insisted that its action must be confined within the powers conferred by the states, whose action had been approved by congress

in calling the convention, and he denied the right to do more than amend the articles of confederation. And he was firm to the very last in asserting the sovereignty of the states and the continuance of their equality. The leading features of the Virginia plan were representation in each of the two houses proportionate to contribution or free population, a single executive, and the practical extinction of the states as confederate sovereignties. The New Jersey plan as presented by Paterson, though it vested in congress power to raise money by duties and to regulate foreign and interstate commerce, had as distinctive points, the retention of state sovereignties, and state equality; and for an executive a board of several persons with carefully limited powers. It was soon manifest that this last plan, as such, would not be adopted.¹ The contest over it, however, secured to the States equal representation in the senate, the method determining the choice of the electoral college—and

¹ The plan of Mr. Paterson contemplated the amendment of the articles of confederation—By vesting in Congress power—To raise a revenue by duties on imposts, stamps, and postage—To regulate trade and commerce with foreign nations, and between the States; all punishments, fines, forfeitures, and penalties, to be adjudged by the common law judiciary of the State, in which the offence should be committed, subject to an appeal to the judiciary of the United States—To make requisition upon the several States, in proportion to the whole number of inhabitants, including those bound to servitude for a term of years, and three-fifths of slaves; and in case of non-compliance, to direct the collection of the same—To elect a Federal Executive to consist of several persons, paid by Congress, having power to appoint all Federal officers, etc.—To establish a Federal Judiciary, consisting of a supreme tribunal, appointed by the Executive, during good behavior, to have original jurisdiction in case of impeachment, and

generally so much of state control as belongs to the constitution. Said John C. Calhoun, in 1847, "The three states, Massachusetts, Pennsylvania, and Virginia, were the largest, and were actively and strenuously in favor of a 'national' government. The two leading spirits were Mr. Hamilton, of New York, probably the author of the resolutions, and Mr. Madison, of Virginia. In the early stages of the convention there was a majority in favor of a 'national government.' But in this stage there were but eleven states in the convention. In process of time New Hampshire came in—a very great addition to the federal side, which now became predominant. It is owing mainly to the States of Connecticut and New Jersey, that we had a 'federal' instead of a 'national' government—the best government instead of the worst and most intolerable on earth. Who are the men of these states to whom we are indebted for this admirable government? I will name them; their names ought to be engraven on brass and live forever. They were Chief-Justice Ellsworth, Roger Sherman, and Judge Paterson, of New Jersey. The other states farther south were blind; they did not see the future. But to the coolness and sagacity of these

appellate jurisdiction in cases relating to ambassadors, captures, piracy and felony on the sea—To impose an oath of fidelity, etc., on all officers—To make the Federal laws and treaties the supreme laws of the land, and to call forth the military powers of the confederated States, to enforce such laws—To provide for the admission of new States into the Union—To provide for deciding upon all disputes between the United States and an individual State, respecting territory—To make uniform rule of naturalization, etc., etc.

three men, aided by a few others not so prominent, we owe the present constitution.”² I quote the words of this distinguished witness without agreeing at all with his views of the constitution. That instrument is both national and federal. Each characteristic is essential to its usefulness. A government merely federal is a rope of sand. One merely national would be incompetent to the task of securing the rights and happiness of a continent. It is the possession of both which assures the future as well as the present, and makes the rope, not sand, but adamant.

Had Mr. Calhoun been asked which of the three distinguished men he named did most to attain the result he eulogized, he could hardly have failed to mention Paterson. The study of the debates of this convention leaves one in no doubt. From first to last, with conscientious persistency and admirable force, he labored for this object, exceeding all others in the devotion with which he pursued it.

Shortly stated, Mr. Paterson regarded the convention's duty to be defined by Congress, which he urged had resolved that the convention should be held for the sole and express purpose of revising the articles of confederation and reporting to Congress and the several legislatures such alterations and provisions thereon as should, when agreed to by Congress and

² More decided language even than this, had been used by Mr. Calhoun on an occasion some years previous when he accidentally met the grandson of Mr. Paterson in Washington.

confirmed by the states under the executory articles of confederation, be adequate to the exigencies of government and the preservation of the Union. Yet the evident preference of the members from the great states did not enable them to form one government, simply national. Mr. Paterson denied the right of these members to go beyond their powers. He contended that thirteen sovereign and independent states could not form one government, that the members of the convention could not destroy the sovereignty of the very states they represented, to make the new Federal sovereignty more secure. He maintained further that a Federal Government could be framed, to act upon individuals as well as states, and he declared with emphasis that he would never consent to the proposed plan, that of government by proportional representation in each legislative body, nor would New Jersey submit to despotism or tyranny.

A late biography of Ellsworth declares that when the division between the advocates of these clashing opinions was under discussion, William Paterson of New Jersey, "with fire and bitterness, assailed the whole plan before the house for its clear purpose and tendency to destroy the equality of the states in their common government, by basing directly on population the apportionment of representatives in the legislature."³

The Constitution finally adopted established all

³ Brown's Life of Oliver Ellsworth, 124.

the main points for which Paterson contended, that the states as existing, small as well as great, should continue sovereign, and be in the senate equal in power, and that new states, with like powers, should be constituted from time to time—in brief, that while the population should be the measure of influence in the House of Representatives, the upper house should be constituted as was the confederate congress of old—a convention of sovereignties, and that local matters generally should be transacted under constitutions and laws made by each State for itself, while foreign relations and relations of the states with each other, and many matters akin to these, should be exclusively dealt with by the national government. It was well termed by Mr. Ellsworth, a general government, partly federal and partly national. It is well known that the necessary ratification of the constitution by the people of the states, which was necessary by its terms, to the establishment of the new government, was long delayed and for a while, doubtful. New Jersey, however, was not long in her ratification, she voted to assent to the constitution in December 18, 1787, being the third state to take this action. To this ratification Mr. Paterson assented, which proves that his desires were satisfied by the provision creating the senate, though much in his “plan” was not carried out.

The Constitution went into force March 4, 1789. The first Congress, after much delay, organized in New York City on April 6th. Mr. Paterson and

Jonathan Elmer were the first senators from New Jersey. The committee on the judiciary had Oliver Ellsworth of Connecticut as chairman. Paterson was a member, being named immediately after Ellsworth. The chief task of this committee was one of the largest importance,—drawing the act organizing the Judiciary, and imparting efficacy and vitality to the Federal Courts. The work was done to the great satisfaction of the bar and people, and is still regarded with deepest reverence. The credit is fairly to be shared between the two able lawyers and statesmen, Ellsworth and Paterson, college friends at Princeton, who each labored hard and carefully to perfect the act. Frequently eulogized, seldom altered, it is a monument to the learning, industry and skill of these co-workers. While the act properly maintains the supremacy of the laws of the United States within their designated spheres, it carefully abstains from unnecessary interference with the judicial tribunals of the States. In a speech delivered by Mr. Paterson, advocating the law proposed, he gave a definition of our government, in harmony with the sentiments he had expressed in the convention. He asks:

What are we? Of what do we consist? Of what materials compounded? We are a number of free republics, confederated together and forming a social league. United, we have a head; separately, we have a head each, operating on different objects. When we act in union, we move in one sphere; when we act separately, we act in another, totally distinct and apart. God grant that they may always remain so.

The provisions of the act, which gives to the Supreme Court power to revise and annul the decisions of the highest courts of the several states, in cases involving the construction of the constitution or laws of the Union, prove that he gave no sanction to the unfounded inference, from these remarks, that the states held a reserved right to secede from the Union.

Mr. Paterson did not remain long in the United States Senate. Governor Livingston of New Jersey died in 1790. Paterson was then chosen by the Legislature to succeed him, and resigned his commission as senator, accepting the appointment of governor and chancellor of the State. To this office he was afterwards re-elected. While governor he commenced a work which occupied him several years, and for which he was eminently qualified. In November, 1792, a law was passed by the Legislature of New Jersey, providing that he should be "appointed and authorized to collect and reduce into proper form, under certain heads or titles, all the statutes of England or Great Britain, which before the Revolution were practiced, and which by the constitution, extend to the State, as also all the public acts which had been passed by the Legislature of the State, both before and after the Revolution, which remain in force, which said bills, as soon as the whole should be completed, he should lay before the Legislature, to be by them, if approved, enacted into law." Though somewhat interrupted by his duties as a judge of the United States Supreme

Court, to which he was appointed March, 1793, he continued (during the succeeding five or six years), to revise and remodel the British statutes proper to be enacted. From time to time the Legislature enacted the revised acts as a part of the statute law of the State. By an act passed in 1793, he was authorized to modify and alter the criminal law of the State, and was directed to reduce it into proper form, with proper titles, to be by the Legislature approved and enacted into laws. In 1795, it was enacted that he be authorized, according to his discretion, to correct, alter and modify such of the statutes and laws which he had not reported on, and also to draft such bills as should appear to him conducive to the completion of the revision and system of the laws of New Jersey. Upon the completion of his revision of the British statutes, an act was passed that thereafter no statute or act of Parliament of England or of Great Britain, should have force or authority within New Jersey. This section appears in the draft prepared by him. Examination of the statutes Mr. Paterson compiled, will convince any lawyer of the care he took to make them complete, and to preserve, so far as circumstances would allow, the old terms, most of which had undergone judicial examination. It may be safely said that when he completed the work assigned him, including all the public acts in the book published by him under the authority of the Legislature, he completed a system of statute laws more perfect than that of any other State, and thus laid

the foundation of a body of laws, which have continued to this day to deserve the highest praise. Says a learned chief-justice of the Supreme Court, speaking of one of the results of his labor:

The act to regulate the practice of the courts of law, passed in 1799, shows the hand of a master. Instead of attempting a perfectly new system, Mr. Paterson wisely took as his principal model the practice of the English Court of the King's Bench, which had always been the practice of the courts of New Jersey, and introduced amendments which made it more suitable to her altered circumstances, many of which were soon adopted in England.

He also greatly improved the practice of the Court of Chancery, of which he himself was the judge, by the act respecting that Court, reported soon after his appointment, but not adopted until June, 1799. New Jersey has made very few alterations of substantial nature in these codes of practice.

In 1793, as above stated, Governor Paterson was nominated by President Washington as a Justice of the Supreme Court of the United States, a nomination which preceded that of Ellsworth as chief-justice. He held that office during the remainder of his life. He at once attained high reputation as a judge. His duties required him to travel from Maine to Georgia, and thus he became known to the country at large. His opinions, mostly found in Dallas's and Cranch's Reports, fully sustain his reputation as a lawyer. There were very few cases in the early history of the courts of the United States.

He had his share of them in the United States Circuit Court for Pennsylvania. In the case of *Vanhorne vs. Dorrance*, tried in 1795, which occupied fifteen days and involved the title to land in the valley of the Wyoming in Pennsylvania, claimed by the plaintiff under a title derived from Penn and by the defendant under a title from Connecticut, fortified by a deed purporting to be from Indians, and by an act of the Legislature of Pennsylvania, he delivered a very elaborate charge in favor of the plaintiff. The main question was the constitutionality of an act of the Assembly of Pennsylvania, which quieted the Connecticut claimants. This he held to be contrary to the constitution of that State, and therefore invalid. The case ranks as one of the great cases of our Constitutional law. It antedates by seven years the similar decision of Judge Marshall in *Marbury vs. Madison*. He reached the conclusion that an act contrary to the constitution which created the legislature is void, not by an examination of the text of the particular constitution before him, but from the very nature of a government, created by a written constitution.⁴ He asks:

What is a constitution? It is a form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only

⁴ 2 Dallas's Reports, 308.

by the authority that made it. The life-giving principles and the death-doing stroke must proceed from the same hand. What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution; it is their Commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void.

The student of Marshall's opinions will note that the keynote of the argument by the great chief-justice in *Marbury vs. Madison* is similar to that which Judge Paterson in the above quotation expresses so forcibly. He also presided in the trial of several of the persons charged with treason in resisting the authority of the United States, during what was called the Whiskey Insurrection. Perhaps the most celebrated of the cases was the indictment against Matthew Lyon for a violation of the sedition law, passed by Congress in 1798. He maintained its constitutionality and sentenced the defendant to pay a fine of \$1,000. The Supreme Court sustained his decision, that the law did not violate the Constitution, but it was not long before public opinion

compelled the repeal of this and of the alien and sedition law.

Mr. Paterson's friends were much dissatisfied with President Adams, that, upon the resignation of Chief-Justice Ellsworth, he did not select Paterson to take his place. On account of his learning and ability a very general expectation was entertained that the position would be offered to him. It is said that Adams objected to nominating him because it might wound his old friend, Judge Cushing, who was the senior member of the Court. The non-selection of Paterson, however, was compensated by the fact that the man chosen for the position was John Marshall.⁵

The last of Judge Paterson's official acts, and of his public life, was as a presiding justice with Judge Talmadge in the Circuit Court of the United States at New York, at the trial of indictments against Samuel G. Ogden and William S. Smith, for violating our neutrality acts by aiding Miranda in his expedition to wrest some of the South American States from the dominion of Spain. The trials excited great attention, public sympathy being strong with the defendants, and eminent counsel having been employed. Judge Paterson delivered an elaborate opinion. He held that the facts, which it was alleged could be proved, would be no justification to the defendants for the acts charged against them as criminal.

⁵ Flander's *Life of John Marshall*, p. 130.

Mr. Paterson, at the time of this trial, was in very ill health. After this decision the case was adjourned for several months. His health continued to decline, and he died in Albany at the residence of his daughter, the wife of the Patroon, on the 9th of September, 1806, in the sixty-second year of his age.

Says the learned Judge Elmer, from his extended memoir of Judge Paterson, in his "Reminiscences of New Jersey":

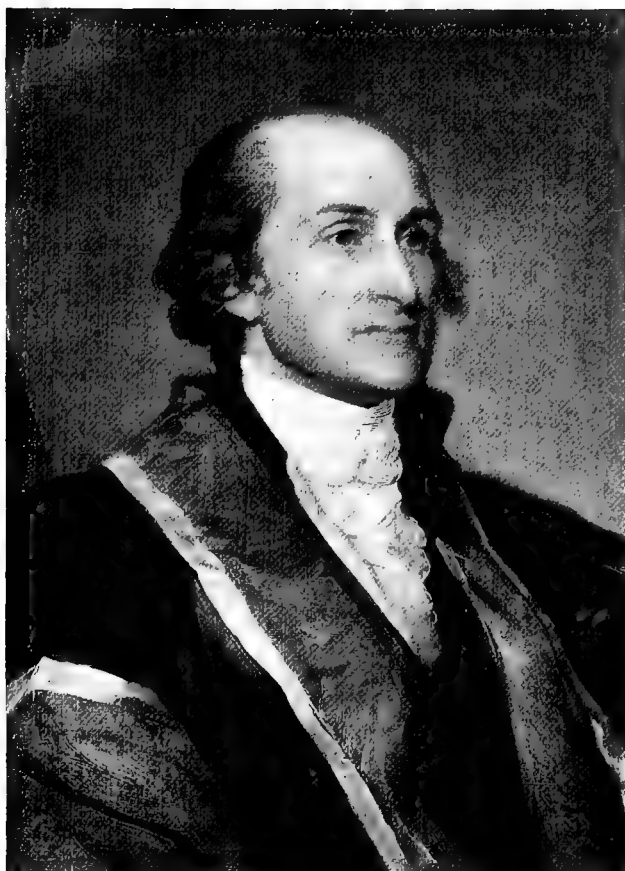
Though possessing an intellect and ability of high order, Judge Paterson was no orator, in the ordinary acceptance of the term. He was diligent and laborious, and as a lawyer prepared his cases with much examination. He said, himself, in a letter that he was not one of those ready men, who can at the bar take up a long and intricate case, and manage it with ease and address. He evidently distrusted his own ability, but when placed in position in which it was his duty, his earnest and eloquent speeches in the great constitutional convention, as reported by various authors, show that his self estimate was the fruit of his modesty. . . . The truth would seem to be, that without intending oratory, when under adequate and just excitement, he was no stranger to the practice of true eloquence.

High talent, great patriotism, sound judgment, adhesion to logically formed opinions, strong reverence for established law, taking every pains to act in conformity with it, a life of severe study ripening his good sense and finally making him the Solon of his state, these characteristics entitle him to the reverence that New Jersey has always felt and expressed for him, and to the sympathetic good opinion of him by all who learn of what value his life was, not only to that state, but to the nation.

JOHN JAY.

JOHN JAY

From the painting by Gilbert Stuart in the Metropolitan Museum, New York City. The painting is the property of Mr. Augustus Jay and is reproduced by his permission.



JOHN JAY.

1745-1829.

BY

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in the George Washington University.*

THE first Chief-Justice of the United States will always hold a place apart among the jurists of this country, notwithstanding the fact that the details of his activity during his brief tenure are so meagre, if not fragmentary, that it is impossible to base upon them any just or satisfactory idea of his ability as a judge or his learning as a lawyer.¹ The mere fact that the first president of the United States selected him as the fittest of all his fellows for the position, or rather that Washington offered him the choice of positions in the new government, is in itself proof positive of the worth and character of the man; and the fact that Jay himself selected the chief-justiceship as most in accord with his tastes and in-

¹ In the preparation of this article Mr. Pellw's admirable life of Jay in the American Statesman Series, has been frequently quoted and often paraphrased. The Correspondence and Public Letters of Jay edited by Johnston, has been constantly consulted. In a lesser degree Jay's Life by his son has been referred to and Flander's Lives of the Chief-Justices has been consulted in the matter of Jay's Chief-Justiceship.

clination would go far to establish his fitness for the position if other proofs were lacking.

Jay was far from emotional, and men and measures passed with difficulty the searching criticism of a singularly keen and just judgment. He measured himself by the standard he applied to others, and the estimate of his own powers was not a whit the less impersonal than was his estimate of friend or foe.

He selected the chief-justiceship because he knew that he was qualified for the position, and contemporaries as well as posterity accept the verdict as founded in every particular. It is well within the mark to say that probably no one would today dissent from the stately phrases in which Washington refers to the appointment: "In nominating you for the important station which you now fill, I not only acted in conformity with my best judgment, but I think I did a grateful thing to the good citizens of these United States."²

The cast of his mind was judicial and the course of his life off the bench was a daily proof of his fitness for the bench; but the best justification of the appointment is nevertheless the judicial gravity and capacity shown in his conduct of the affairs of State. In this, he is in marked contrast with his distinguished successor, who is, with one accord, acclaimed the great Chief-Justice. In Congress as in the Cabinet, Marshall was pre-eminently a partisan—a politician in the better sense of the word. Few could

² Correspondence and Public Papers, vol. II, 378.

believe that the judge lay deeply imbedded in the ardent Federalist; but once Chief-Justice the judicial quality of the man triumphed over the politician, and displayed itself in unsuspected purity and greatness. Had Jay never sat on the bench his fitness for the position would have been as patent to posterity as it was to his contemporaries; had Marshall remained in active politics it is not probable that we should know that we had lost our greatest judge.

The life of John Jay falls into three equal groups of twenty-eight years.³ In the first period, he fitted himself for public position; in the second he worthily occupied the highest stations with credit alike to himself and his country; and in the last period he lead a quiet but no less dignified life of retirement, consoled by the recollection of a spotless career and preparing himself for the life eternal.

It is the purpose of the present article to consider the career of John Jay in the second period with only such reference to the first and the last periods as is necessary to understand the preparation for his public career, the career itself, and the character of the man as the resultant of preparation and achievement.

John Jay was born in the city of New York on the 12th day of December, 1745. The ancestry is in one respect important as it accounts in part for the austerity of his life and the fervor of his religious convictions, which approached as near to fanaticism as was consistent with a nature as restrained as it was

³ This happy division is Pellew's, not the writer's.

judicial. His great-grandfather, Pierre Jay, was a Huguenot of La Rochelle, and on the unfortunate revocation of the edict of Nantes in 1685, the merchant sought refuge in England. Most of his property was confiscated after the manner of the day, but the spirit was unbroken. We would all admit that the act of persecution was unjustifiable, but it was doubly unfortunate to France in that it drove beyond the Kingdom the most devoted and the most skilled of French workmen.

The Elector of Brandenburg was wise enough to offer an asylum and the commercial prosperity of Prussia was due in no small degree to the Protestant refugees from France. And it may not be without interest to note that the first German officer to fall in the fateful war of 1870 bore the name of a Huguenot outcast. The same is true in a less degree of Holland, and the influence of the Huguenot in England is clearly traceable. Not to go beyond the domains of law, the most perfect and rounded master of English law, Sir Samuel Romilly, had not a drop of English blood in his veins, and in other walks of life the exile was hardly less useful, if less distinguished.

The grandfather, Augustus Jay, settled in New York in 1686, where he married one Maria Bayard, a descendant of a Protestant professor of theology at Paris, who sought the protection of Holland.

It is barely possible that the leaning to Holland and the admiration of the Dutch in the writings of Jay may have been tinged by an unconscious senti-

ment as well as by their intrinsic merit. The law of an orderly and regulated liberty in which the individual was protected from despotism on the one hand as well as from license on the other, which led Jay to prefer England to France, may perhaps be explained by ancestry as much as by temperament.

The intermarriage of the father, Peter Jay, with the Van Cortlands, associated the young man with the traditions of Holland, and England and Holland suggested themselves, and not unnaturally, as models for the career of their gifted son.

In another respect, the ancestry of Jay was an advantage in the trying period of the French Revolution when the Federalists were accused of truckling to England. In the midst of the opposition in 1796 to the so-called Jay Treaty with Great Britain, Jay could and did say: "Not being of British descent [of his great grandparents three were French and five Dutch] I cannot be influenced by that tendency towards their national character, nor that partiality for it, which might otherwise be supposed to be not unnatural."

But to return to the subject of the sketch. The youth of Jay offers nothing that is remarkable, except that he seems never to have been young in the ordinary sense of the word, and the balanced way of life, often the result of experience, seems in him to have been innate.

"Johnny"—it seems almost as much a profanation to think of him as "Johnny" as it is to learn that

Emerson smoked—"Johnny," said his father, "is of a very grave disposition and takes to learning exceedingly well." This was said of him at seven, and it is therefore not surprising to learn that the youth was prepared for college at the age of fourteen. The college was Columbia, then known as Kings, and thus he was one of the earliest as well as the most distinguished of the alumni.

There is one slight incident that shows that young men of character were then as unwilling as now to peach on their fellows. For a breach of discipline committed in the presence of Jay several students were banished. In this matter Jay took no part, but for refusing like a man of honor to reveal the names of his fellow students, he shared their fate. He was, however, soon allowed to return and finished his course without other incident.

In his last year as an undergraduate, the young man—"a youth remarkably sedate and well disposed"—determined upon the study of law. On learning the son's choice the father wrote to him: ⁴

Your observations on ye Study of ye Law I believe are very just, and as it's your inclination to be of that Profession, I hope you'll closely attend to it, with a firm resolution that no difficulties in prosecuting that Study shall discourage you from applying very close to it, and, if possible, from taking a delight in it.

It is perhaps worthy of note as throwing a light upon the seriousness of purpose, that Jay is reported

⁴ Correspondence and Public Papers, vol. I, 1.

to have begun his preparation for the bar by a study of a subject which few lawyers deem of importance either to the preparation or completeness of their studies. It appears that he read carefully and thoroughly the *De Jure Belli ac Pacis* of Grotius and thus bottomed himself upon the law of nations which as diplomat and judge he was called upon to apply and expound.⁵ The book of Grotius bore immediate fruit, and on graduation in 1764 he delivered a much admired dissertation upon the blessings of peace.

Almost immediately upon graduation Jay bound himself an apprentice for five years to Benjamin Kissam, an eminent barrister of the day, and had as companion for two years of the time, one Lindley Murray, of whose subsequent title to fame the Chemist Dalton said that "of all the contrivances invented by human ingenuity for puzzling the brains of the young, Lindley Murray's grammar was the worst." However that may be, Murray's account of Jay is interesting. "He was remarkable," according to the grammarian, "for strong reasoning powers, comprehensive views, indefatigable application, and uncommon firmness of mind."

In 1768 Jay was admitted to the bar, and at once formed a temporary partnership with Robert R. Livingston,⁶ later secretary of state, chancellor of New York, and negotiator of the famous treaty which

⁵ The charge of the Grand Jury at Richmond, May 22, 1793, and the trials of Gideon Henfield and Ravara are noted later.

⁶ See essay on *infra*. p. 433, ed.

added the vast territory of Louisiana to the United States.

A young lawyer's practice is as a rule interesting only to himself, and Jay's is no exception. The nature of his cases appears from the following extract from a letter: "One is about a horse-race, in which I suppose there is some cheat; another is about an eloped wife; another of them also appertains unto horse-flesh. . . . There is also one Writ of Inquiry."⁷ The daily routine was varied by the formation of "The Moot," a club that met monthly to discuss questions of law. The members of this club are well known to fame, and include the following names: Egbert Benson, Robert R. Livingston, James Duane, Gouverneur Morris, and Peter Van Schaack, the loyalist. Frequent visitors older than the members included William Smith, later chief-justice of Canada, Samuel Jones, the chief-justice, and John Morris Scott, famous as patriot and general in the Revolution.

Jay was already, in 1771, a successful lawyer, and the first twenty-eight years of his life closed happily with his marriage with Sarah Livingston, youngest daughter of William Livingston, the famous Revolutionary governor of New Jersey. The end of the year closed his private career at the bar; and the stirring days of the Revolution, it may be said, thrust him into public life rather than offered him an op-

⁷ Letter of Kissam to Jay, Nov. 6, 1769; Correspondence and Public Papers, vol. I, 9.

portunity to display the talents and ability which he had cultivated assiduously in private.

The Revolution found Jay a quiet practitioner, alike by temperament, training, and fortune conservative; it left him a leader in the national life of the young republic, trusted and honored at home, and known as an able diplomat in the courts of Europe.

In the first two years of the movement from 1774 to 1776, there were in New York, as in the other colonies, two parties; one radical and revolutionary, of which the Adamses in Massachusetts may be taken as the type; the other no less patriotic, but more bent on securing the recognition of their rights and a redress of admitted grievances by concessions from within the Empire rather than from the overthrow of British authority. Of this type Jay, in New York, and Dickinson, in Pennsylvania, were fairly representative.

The passage of the Boston Port Bill in 1774 was the signal for open resistance. When the news of the measure reached New York the smouldering opposition leaped into flame; a meeting assembled to consider the course to be pursued, and a sub-committee, with Jay as a member, was appointed to draft a reply to a message from Boston. The letter was composed by Jay and urged that "a Congress of deputies from the colonies in general is of the utmost moment," to form "some unanimous resolutions. . . . not only respecting your (Boston's) deplorable circumstances, but for the security of our com-

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mon rights.”⁸ The letter suggested that the question of a non-importation agreement should be left to the Congress. The idea of united resistance was in the air and although a recommendation of substantially the same character had been made earlier, or about the same time, by the House of Burgesses of Virginia, and by meetings in Providence and Philadelphia, no news of these proceedings had reached New York. Common necessity had devised a common plan, and co-operation of all, for the benefit of all, irrespective of locality, occurred to the thoughtful simultaneously. The New York idea of a congress appealed to the colonies, and delegates were chosen in one colony after the other for the purpose of a united and universal protest. Jay and his colleagues were unanimously chosen delegates to the Congress, known and justly famous as the First Continental Congress, which met in Philadelphia on the fifth day of September, 1774.

Of this remarkable assembly Jay, although the youngest, was by no means the least conspicuous member. “Mr. Jay is a young man of the law,” to quote an entry in John Adams’s diary, “a hard student and a good speaker.”

The colonies were not ready for independence; a redress of grievances was the desire of all and the utmost that a loyal consideration could suggest. Revolution was the desire of the radicals and posterity has justified them. But the effort of the con-

⁸ Correspondence and Public Papers, vol. I, 13-15.

servatives to secure by petition and remonstrance, futile as regards Great Britain, was of supreme importance in convincing the backward elements in the colonies that nothing was to be hoped from negotiation.

"The measure of arbitrary power," said Jay, "is not yet full, and I think it must run over before we undertake to frame a new constitution." Congress therefore decided, and wisely, to appeal to the people of Great Britain, and the address drawn up by Jay⁹ was declared by Jefferson, himself an authority on such matters, to be "a production certainly of the finest pen in America."

From this first Congress, which sat for a period of six weeks and in which all the colonies but Georgia were represented, the Union may not improperly be dated. There was as yet no intention to overthrow the home government, but the agency had been set in motion which would inevitably lead to it, unless the grievances were redressed. George III and his besotted ministers never thought of concession except as a temporary expedient or as an indirect means of accomplishing their ultimate purpose; namely, the closer, indeed the complete dependence rather than the interdependence of mother country and colonies. The struggle was greater than most people knew, for had the sentiment of liberty been crushed or stifled in the colonies, it would have languished and suffered, if it were not actually destroyed, in Great

⁹ Correspondence and Public Papers, vol. I, 17-32.

Britain. The cry of "George be King" always rang in the ears of the royal madman, and the overthrow of the cabinet system and the loss of constitutional liberty were in the balance. It is a trite saying that the battle of English Constitutionalism was won in America, but it is better than trite: it is true. It is no small tribute to the sagacity of Jay that he clearly gauged the importance of the conflict.¹⁰

Be not surprised, therefore, that we, who are descended from the same common ancestors; that we, whose forefathers participated in all the rights, the liberties, and the constitution you so justly boast of, and who have carefully conveyed the same fair inheritance to us, guaranteed by the plighted faith of government, and the most solemn compacts with British sovereigns, should refuse to surrender them to men who found their claims on no principles of reason, and who prosecute them with a design that, by having *our* lives and property in their power, they may with the greater facility enslave *you*.

The instigators of sedition are now the patriots of Great Britain, as well as of the country whose very existence is the work of their hands.

The Congress adjourned to meet in the ensuing year and in this assembly which met on May 10, 1775, every colony was represented. But in the interval of eight months between the two, the colonists and the King's troops had met in battle. Lexington and Concord had been fought and the British army was already besieged in Boston. The duty of the Congress was twofold, to prepare for war, and to

¹⁰ Correspondence and Public Papers, 1763-1825, vol. I, 18.

endeavor to secure by peaceful means the safeguard of colonial liberty. Firm and decided, the Congress was loyal, and Jay persuaded them to present a petition to the King. This was written by Dickinson, and addresses were likewise sent to Canada, Jamaica, and Ireland. The undoubted purpose was to create sympathy, and to justify their attitude. But the various addresses were needed nearer home; each petition convinced the conservative colonists and members of Congress of the justness of the cause, and converted them to a bolder course while they yet spoke softly.¹¹

The utter failure of the petition to the King, as well as the scorn and contempt with which it was treated, marked a step in the attitude of Congress and its conservative members. Jay dates the desire for revolution from it. "Before this time," he says, "I never did hear any American of any class or of any description, express a wish for the independence of the colonies." From this moment Jay, while always conservative, became a believer in more progressive measures, and by voice and vote henceforward he consistently supported a vigorous policy. He was rapidly becoming the leader, and had not the affairs of New York summoned him home, it is not unlikely that we might cherish him both as writer and signer of the Declaration of Independence. On

¹¹ Such is the testimony of John Adams: "I was in great error, no doubt, and am ashamed to confess it, for these things were necessary to give popularity to the cause, both at home and abroad." John Adams's Works, vol. X, 80.

the 10th day of May, 1776, Congress passed a resolution recommending the colonies "to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."

When Jay entered the New York Provincial Congress to which he was elected in April, 1776, he entered upon an entirely new career. He was conservative by nature, moderate in temperament: but henceforth he did not follow the radicals; he led the revolution in his state. The years 1776 to 1779 were spent in New York, and Mr. Pellew rightly heads his chapters dealing with the period, Revolutionary Leader, Constructive Statesman; for he appeared to advantage in both rôles. Of Jay as a revolutionary leader there is no great need to speak: suffice it to say that he was as active in determining the policy of the state as he was in devising measures to protect it from the enemy without and within. The task was difficult in the extreme, for revolutionary sentiment barely existed outside of the city of New York, and even that city yielded to British occupation without outbursts of patriotic feeling.

At this time the fate of the young nation seemed to hang on New York. There was no west beyond it, and it shut off New Jersey, Pennsylvania, and the South from New England, the veritable hot-bed of secession. Then, too, it commanded the road to and from Canada. Its possession seemed pivotal, but

notwithstanding every exertion of Washington and his little army, the Delaware was crossed, and the end of 1776 saw the British securely entrenched in Manhattan. In the interior the Revolutionists were active in intimidating, crushing out, or expelling the loyalists. As a member of the Secret Committee Jay was as effective as he was impartial, and personal friends, such as Van Schaack, found him as immovable as did the enemy. To quote his own words: "In the course of the present troubles, I have adhered to certain principles, and faithfully obeyed their dictates without regarding the consequences of my conduct to my friends, my family, or myself." To sum up the result of his activity without going into details, Jay's energy saved the state. The next problem was to govern the state that the energy of himself and his friends had saved.

Within a week of the Declaration of Independence the Provincial Congress of New York met at White Plains and on the first day of its session, July 9, 1776, Jay drafted and reported the following resolution which was unanimously adopted:

That the reasons assigned by the Continental Congress for declaring the United Colonies free and independent States are cogent and conclusive; and that while we lament the cruel necessity which has rendered that measure unavoidable, we approve the same, and will, at the risk of our lives and fortunes, join with the other colonies in supporting it.

If the United States were free and independent, it followed that the state of New York was independ-

ent of Great Britain, and it likewise followed that the state should have an independent government. To frame this government and to put it into force and effect was the work of 1777. It has been more than intimated that Jay was conservative; it was natural therefore that he should not manufacture a constitution out of whole cloth. He would undoubtedly have given his assent to Sir James Macintosh's happy maxim: "Constitutions are not made: they grow." In the case of our country at large, the Federal Constitution grew out of the British constitutional practice. In the case of New York, the first state constitution grew out of the provincial government, with such modifications as experience and expediency suggested. The basis of state as well as national constitution was simply provincial or local custom unified and extended upon a larger scale. This idea is admirably expressed in the following quotation:¹²

The bicameral legislature, the power of the legislative houses to be the sole judges of their own memberships, the method of choosing the presiding officer of the more popular branch, the parliamentary common law, the veto on legislation, the bill of rights, the judicature, the jurisprudence, and the franchises, were all Provincial institutions, continued after the Revolution by virtue of the Constitution, and because they were associated with all that was wisest and best in the previous history of New York. The Revolution was not a war against these things; it was a war for these things — the common property of the Anglican race.

¹² R. L. Fowler, *Constitution of the Supreme Court of New York*, Albany Law Journal, December 18, 1880, p. 488. See also, *Pellew's Life of John Jay*.

"Those who own the country ought to govern it," said Mr. Jay, and a property qualification passed from the provincial into the state constitution. Checked by the Council of Appointment and the Council of Revision possessing the power of veto, the governor was little more than a figurehead. But colonial experience was not apt to confer extensive power on the governor. The experience of independent and local self-government has shown the un-wisdom of checking the governor, and everywhere in the country the restrictions of Revolutionary days have been removed.

The reorganization of the law courts will show not only Jay's conservatism, but his belief in the necessity and adequacy of the common law. The Supreme Court was continued as was also the trial by jury "in all cases in which it hath heretofore been used in the Colony of New York."

In the following passage the fundamental character of the common law is emphasized: "The legislature shall at no time hereafter institute any new court or courts, but such as shall proceed according to the courts of the common law." The one new court created was the Court of Errors and Impeachment in which senators and designated justices of the Supreme Court sat. The origin of this court is evident. The English House of Lords exercised appellate jurisdiction and still does. It has also sat occasionally as a court of impeachment. But the new court was a decided improvement on the model in

that many of the senators were lawyers, and the judges as individuals and as a body had power to advise, though not to vote, upon appeals from their judgments. The lords were rarely lawyers, and it was often necessary to submit a question to the judges of England for their consideration and report.

The New York modification was an improvement. The whole system, however, has passed away with the Revolutionary age and the lawyer of today, as he comes upon it in the Reports, looks upon it as a curiosity with little or no thought of its origin. It is important, however, as showing how thoroughly English was the bent of Jay's mind; for the Constitution in its entirety was in Jay's handwriting, and for the amendments proposed and adopted in convention, Jay was largely responsible.

The Constitution as framed and amended was not submitted to the people, but as adopted and published on April 22, 1777, it remained in force with minor changes until 1846. The Constitution was necessarily hasty, but the work was the work of Jay, and it met instant praise in New York, New England, and in the country at large. It was "generally regarded as the most excellent of all the American Constitutions," and it is claimed to have been essentially the model of the National Constitution of 1787. Were this so it would be great praise indeed; but the Federal Constitution is rather the experience of all colonies and the wisdom of one assembly rather than a conscious imitation of any single instrument.

Under the new government, Robert R. Livingston was appointed chancellor and Jay chief-justice. General Clinton was appointed governor and so remained until he was beaten at the polls by John Jay many years later.

It is often stated that the polity and political development of New York would have been vastly different had Jay been the first governor, and the speculation is interesting if idle. The fact is Jay was urged to become a candidate for the governorship and he might or might not have been elected. It is, however, patent that he preferred the chief-justiceship, at the time of Clinton's selection. He said:

That the office of the first magistrate of this State will be more respectable as well as more lucrative, and consequently more desirable than the place I now fill, is very apparent. But . . . my object in the course of the present great contest neither has been, nor will be, either rank or money. I am persuaded that I can be more useful to the State in the office I now hold than in the one alluded to, and therefore think it my duty to continue in it.

Beyond Jay's desire for the bench and the fact that he actually was chief-justice, little or nothing can be said. The British courts of justice sat in New York in the loyalist neighborhood; courts were held and charges delivered by Jay as chief-justice in the interior of the state, but it is a fact that the court never once sat *in banc* during the Revolution. It is also a fact that no reports were published for the first twenty-two years of the court's existence, so that

it is impossible to test from the reported judgments the quality of Jay's mind. His conduct as a statesman is here as elsewhere the best, and indeed in this instance the only evidence of his fitness for judicial position.

Now, as at a later period, his career as judge was cut short by a political or diplomatic mission. New York, as is well known, claimed Vermont (then technically known as the New Hampshire Grants), and it is equally well known that Vermont objected to the claim and insisted successfully in belonging to itself. It is also common knowledge that the crisis was reached at the time of General Burgoyne's expedition. The New York Legislature deemed it necessary to return Jay to Congress with the special mission of having Congress settle the territorial controversy. He did not resign from the bench at once, but did so on August 10, 1779. The reception to Jay was highly flattering to him and his state alike, for he had hardly taken his seat when he was elected president of Congress to succeed Henry Laurens.

In the matter of Vermont, Jay showed his cautious moderation: he advised New York and New Hampshire to empower Congress to draw the line between the states in question as well as to settle the controversy with Vermont. By subsequent resolution of Congress the question of the disputed boundary was referred to commissioners appointed by these states. While this action was in accordance with the spirit of Article IX of the Articles of Confederation, it

was eminently characteristic of the man. As statesman and judge he was anxious to have the facts ascertained before pronouncing judgment. This action necessarily recognized the statehood of Vermont, for which course the following letter to Governor Clinton is a sufficient justification, if any could be needed:

In my opinion it is much better for New York to gain a permanent peace with her neighbors by submitting to these inconveniences, than, by an impolitic adherence to strict rights, and a rigid observance of the dictates of dignity and pride, remain exposed to perpetual dissensions and encroachment.

It is unnecessary to descant upon the honorableness of the presidency of Congress which was, during the Revolution and before the establishment of the present system of government, the position of greatest dignity within the gift of Congress, unless, indeed, the chief command of the army be excepted. As president, Jay's history was the country's history and is to be found in the annals of Congress. He had constantly been in the public service since 1774, most of the time away from his home, which was a great hardship to one of his domestic temperament. He therefore contemplated retirement,—not the retirement of the politician, but the self-effacement of John Jay. On resigning the chief-justiceship on August 10, 1779, he said: "I shall return to private life, with a determination not to shrink from the duties of a citizen. During the continuance of the present contest I consider the public as entitled to my time and my services." As a matter of fact he

was not able to retire before 1802, but as Mr. Pellew remarks, the sincerity of his decision is shown by the last twenty-eight years of his life. Before this could be done, Congress appointed him minister to Spain, and in the hope of being of service to his country, he resigned the presidency of Congress on October 1, 1779. On the twentieth of the month he and his household were on the way to Spain. Here his mission was fruitless from the beginning. He was unable to obtain official recognition; he was likewise unable to negotiate a loan for more than \$150,000; when Spain went to war it was to acquire Gibraltar and Jamaica, not to help the colonies in America; and the terms of an alliance, the Floridas and the Mississippi, were out of the question. So two years and more, the dreariest in Jay's life, passed and nothing was or could be accomplished. The possibility of peace with Great Britain and the request of Franklin—who admired Jay as much as he pitied his position in Spain—that the latter be transferred to Paris, effected his release. Overjoyed at his liberation from a position of humiliation and impotency, Jay hastened to Paris, where he arrived in June, 1782.

If the mission to Spain was fruitless, the months spent in Paris were not only agreeable, but were of the greatest service to America and the American cause. The war had long since established the practical independence of the colonies, and the only possible excuse for its continuance was to force the rec-

ognition of this fact upon the ministry of George III. The Stillwater Campaign of 1777, resulting as it did in the capitulation of Burgoyne and his army, rudely broke in upon the dream of northern conquest. The surrender of a British army at Yorktown in 1781 stamped the southern plan of campaign as no less impossible. New York and its immediate neighborhood, occupied since 1776, were at once the strength and the weakness of the British authority in the colonies, reduced to a shadow by the crazy policy of a crazy king. France recognized the independence of the colonies by receiving Doctor Franklin, and also by negotiating two treaties on February 6, 1778, the one for offensive and defensive alliance and the other for amity and commerce. It gradually dawned upon Europe that British power was doomed. Little by little Spain and Holland found themselves at war with Great Britain, each hoping for a share of the spoils.

In such circumstances, thought of subjugating the colonies was madness, and it was almost as foolish to continue the war for the shadow, when the substance was already won. The difficulty in the case was that the colonies had bound themselves not to negotiate separately; that the treaty of France with Great Britain should be negotiated simultaneously with their own. France was not ready to quit, and besides, she was bound by the secret treaty of *Aranjuez*, and was dependent on the pleasure of Spain.

France has been charged with treachery, but it

is much better to say that France was not wholly disinterested. The loss of Canada had not been avenged; the independence of the colonies would reduce Great Britain and would thus act as a balm. But in pulling down an hereditary enemy it was no part of France's plan to raise up another rival. An independent neighbor of moderate power and extent was equally pleasing and necessary to France should she in the end hold Louisiana; and Spain did not want a rival to the north of the Floridas, territories which the present war was to restore to her possessions.

It is true that the French people were carried away by enthusiasm for the colonial cause, and that Franklin in France and Lafayette in America bound the two countries by a sentimental tie. But the Court and the Cabinet, while taking advantage of the enthusiasm and the opportunities of the war, had other thoughts and other plans.

To quote de Vergennes: "My country's good is dear to me. I am no less devoted to Spain; to contribute to the one and the other, that is all my ambition."

Then, too, Doctor Franklin has been criticized as too yielding to the French court, and it is at times bluntly stated that he was hoodwinked by the subtle de Vergennes. This seems again to be a misunderstanding of the real situation. Franklin knew that French arms and ammunition decided the cause in America and his instructions on the point of co-oper-

ation were direct and binding. He was as desirous as any to secure the independence, not of a part but of the whole of the country; so desirous indeed that he seriously proposed that Canada should pass to the colonies: but he was not unwilling that France should draw her chestnut, whatever it might be, out of the fire. He therefore lent his benevolent presence and a not unwilling ear to de Vergennes and his associates in the ministry. That Franklin did not misunderstand the situation is evident in his statement that with the concession of independence to America "the treaty she (America) had made with France for gaining it, ended."

With Jay the situation was different. He was not predisposed in favor of France, although he had no feeling of hostility; for in his well-regulated mind he separated the mistake of a government, or form of government, from the people of the country.

He was likewise freer than Franklin; for the great doctor had been in France for the past six years as the accredited Minister to the Court of France, and his present was necessarily bound up with his past. It would have been a serious wrench to break with the French court; but when convinced that France was playing a part, delaying or prolonging negotiations for purposes alien to the American cause, Doctor Franklin assumed as fully as the younger man the responsibility for breaking the solemn instructions of his Government that peace be concluded in conjunction and under the advice of France.

Jay's mind was the mind of the trained lawyer and he negotiated solely in the interest of his client without troubling himself unduly about the interest of other parties, such as Spain, or indeed France, if that should prove necessary.

It would serve no useful purpose to recount in detail the phases of the negotiation that so happily resulted in the treaty of September 3, 1783. Two or three points are, however, important now as they were then. Jay was unwilling to treat for independence, that is, to make independence the result of a gift or a grant on the part of Great Britain. He contended, and rightly, that independence was a fact and as such its recognition was an essential preliminary. It was as unbecoming to the dignity and self-respect of America to supplicate as colonies, as it would be humiliating to George III to treat with rebels. Then with independence recognized in advance, it would not be necessary to negotiate or purchase it at the expense of fisheries, boundaries, or other terms. And finally, the precedent recognition of independence would make America free to treat separately if France and Spain should prove a stumbling-block in the negotiation.

Franklin was not much impressed with Jay's idea on the point of independence, and was willing to take it at any time and in any way. He called it a lawyer's notion. "Mr. Jay was a lawyer, and might possibly think of things that did not occur to those who were not lawyers." True, and that is a reason

why lawyers should settle difficult questions involving municipal and international law, rather than entrusting them to the lay mind. But though Franklin did not attach much importance to the matter, Jay prevailed and the British negotiators were properly commissioned to treat with the United States, not with rebellious colonies.

The instructions to the negotiators have been referred to and it is well to quote the clause of June 8, 1781.

You are to make the most candid and confidential communications upon all subjects to the ministers of our generous ally, the King of France; to undertake nothing in the negotiations for peace or truce without their knowledge or concurrence; and ultimately to govern yourself by their advice and opinion.

It has been intimated that Franklin felt bound by these instructions and expressed an unwillingness to break them, at least not upon mere suspicion that France was not dealing in a straightforward manner. Not so Jay, who became convinced of double dealing on the part of France early in the game—for game it was. He felt that de Vergennes had sent a confidential messenger, Rayneval, to London to protest against American interests¹³ and he accordingly dispatched, without consulting Franklin, the economist Vaughan who was representing Britain in a minor way. From this moment America conducted the negotiations separately, in accordance with Ameri-

¹³ Fitzmaurice, *Life of Lansdowne*, vol. III, 263.

can interests. To quote from Oswald, Lord Shelburne's negotiator:

Upon my saying how hard it was that France should pretend to saddle us with all their private engagements with Spain, he (Jay) replied: "We will allow no such thing. For we shall say to France: The agreement we made with you we shall faithfully perform; but if you have entered into any separate measures with other people not included in that agreement, and will load the negotiation with their demands, we shall give ourselves no concern about them."

When John Adams arrived in Paris in October, 1782, at Jay's earnest call, and was informed of the various steps of the negotiation, he fully adopted Jay's view of the situation. A meeting of the triumvirate in Franklin's quarters at Passy, on October 29, 1782, is thus graphically described by Mr. Pellew in his charming life of Jay:

"I told him, without reserve," wrote Adams, "my opinion of this court, and of the principle, wisdom, and firmness with which Mr. Jay had conducted the negotiation in his sickness and my absence, and that I was determined to support Mr. Jay to the utmost of my power in the pursuit of the same system. The Doctor heard me patiently, but said nothing. At the first conference we had afterwards with Mr. Oswald, in considering one point and another, Dr. Franklin turned to Mr. Jay and said, 'I am of your opinion, and will go on with these gentlemen in the business without consulting this court.'" This may have been at the first regular meeting of the commissioners, on October 30, to examine books and papers. It was doubtless on some earlier and more private occasion that the characteristic incident occurred, related by Trescot, and quoted by Parton: "'Would you break

your instructions?' Franklin asked him one day. 'Yes,' replied Jay, taking his pipe from his mouth, 'as I break this pipe'; and so saying Jay threw the fragments into the fire." The significance of this public acknowledgment by Franklin must not be overlooked, for thereby he became fully entitled to the credit, or discredit, of breaking the instruction to act constantly by the advice of France, which credit, or discredit, is usually reserved only for Jay and Adams.

The details of the negotiation belong properly to diplomatic history. The important point for the purpose of this article is that Jay's training as a lawyer, as well as the judicial attitude of his mind, made him place the negotiations on the proper basis, and that when they were so placed and regarded, the details fitted properly, almost naturally, into the scheme: The Mississippi as western boundary; the partition of the fisheries and a mede of justice to the unfortunate Tories.

From the above account it is at once obvious that the brunt of the negotiation was borne by Jay, but that it is unnecessary to blame Franklin. He may have been a trifle too yielding to France at the beginning of the negotiations, but he accepted Jay's proposals and acted in the greatest good faith and in strict accord with Jay and Adams the moment his judgment was convinced. It must not be forgotten that his very presence was a pillar of strength, for Great Britain knew and admired him, while France loved him. As an intermediary, as a compromiser, in a word as a diplomat, his services were invaluable, but contemporary opinion assigned the chief

credit to Jay and posterity can discover no reason to question the justice of the award.¹⁴

Of the many tributes two may be selected: "The New England people," wrote Hamilton, "talk of making you an annual fish offering as an acknowledgment of your exertions for the participation of the fisheries." And testy John Adams was no less cordial or outspoken. "The principal merit of the negotiations was Jay's." Again: "A man and his office were never better united than Mr. Jay and the Commission for peace. Had he been detained in Madrid, as I was in Holland, and all left to Franklin as was wished, all would have been lost." And finally: "Our worthy friend, Mr. Jay, returns to his country like a bee to its hive, with both legs loaded with merit and honor."

As Jay's desire was, however, not to return to a hive, but to private life and the practice of the law, he therefore refused the missions to London and France. On landing, however, in New York on July 24, 1784, he found that Congress had two months previously appointed him Secretary for Foreign Affairs in succession to his friend, Chancellor Livingston. After much doubt he accepted, and secretary he remained until his appointment to the Federal Bench. His reply when urged to run for governor of New York has not lost its point by the lapse of a century and more. "A servant should not leave

¹⁴ See Pellew's *Life of Jay*, pp. 199-200, for various commendatory remarks.

a good old master for the sake of a little more pay or a prettier livery."

Jay at once set himself about the duties of his new office and reorganized it and its methods upon a business plan. Notwithstanding the importance and dignity of the office which became under Jay's management the most important in the government, he was as inadequately provided with quarters as with assistants.

As late as 1788 there were . . . besides the secretary and his assistants, only two clerks, or just enough, as may be inferred from a report of this date, for one of them to be in the office while the other went to luncheon. The quarters of the office, the report tells us, consisted of only two rooms, one of them being used as a parlor, and the other for the workshop.

His tenure of office was far from remarkable, for the simple reason that Europe looked somewhat askance at the young republic, and for the further reason that the young republic was already in the throes of dissolution. It is not without reason that the late John Fiske called this the critical period of American history. The simple fact is that the states were held together from pressure from without, and that, when the danger was removed by the establishment of peace, there was as yet no sufficient national bond to distract their attention from purely local matters. Then too, the character of Congress had greatly deteriorated, and therefore had not unjustly lost its hold on the people. "Jay, what a set of d—d scoundrels we had in that second Congress," Gouv-

erneur Morris is once reported to have said in a friendly conversation many years later. "Yes," said Jay, "that we had."¹⁵

If such a judgment could be passed on the Second Continental Congress, the pious mind is shocked to think what Morris might have said of its successors, and what Jay's love of truth, if not of profanity, would have forced him to admit. If, then, we add to the lack of confidence, the fact that Congress could merely recommend legislation to the states which they might or might not enact, and the further fact that Congress had no power to enforce its own legitimate enactments, it is easy to see that matters were at a standstill. The wheel of State stopped.

To others than Jay belongs the credit of the Constitutional Convention, of which he was not a member, being defeated by the Anti-Federalists. Of the need of a total reorganization on national lines he was a convinced believer, and the Constitution as adopted rested on the fundamental distribution of power outlined in the following paragraph:¹⁶

To vest legislative, judicial, and executive powers in one and the same body of men, and that, too, in a body daily changing its members, can never be wise. In my opinion those three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other. This principle became the corner-stone of the Federal Constitution. Govern-

¹⁵ Pellew's *Life of Jay*, p. 140.

¹⁶ Letter to Thomas Jefferson, Aug. 18, 1786, in *Correspondence and Public Papers*, vol. III, 210.

ment by committees was another chief cause of executive procrastination and inconsistency.

Of the work of the Convention he was a defender with voice and pen. An anonymous address to the people of the State of New York¹⁷ is said to have had "a most astonishing influence in converting anti-federalists to a knowledge and belief that the new Constitution was their only salvation."¹⁸

In the New York Convention he ably seconded the efforts of Hamilton, although the latter is rightly credited with the success of the Convention. And in the *Federalist* he had a small though not unimportant share. He was at one with Hamilton and Madison in its influence and although he contributed but five papers—the second, third, fourth, fifth, and sixty-third—that was due not to any lack of interest but solely to the fact of an injury received at the hands of the so-called Doctors' Mob, while helping to restore order.¹⁹

His papers, worthy of their immortal associates, deal with the value of the union; the advantages and necessity of union in relation to foreign powers; relations with foreign powers; the objections to little separate confederacies, and the treaty-making power of the Senate.²⁰

¹⁷ Correspondence and Public Papers of John Jay, vol. III, 294-319.

¹⁸ Pellew's *Life of John Jay*, p. 229.

¹⁹ For details, see Pellew's *Life of Jay*, pp. 227-228.

²⁰ It is perhaps not presumptuous to suggest that the edition of the *Federalist*, edited by the late Paul Liecester Ford, is the most serviceable for students.

No analysis of these papers is attempted, because Jay's style of writing is so compressed that the original would take little more space than a satisfactory paraphrase.

With the success of the *Federalist*, the ratification of the Constitution and the establishment of the government according to the terms of that instrument, Jay necessarily ceased to be Secretary for Foreign Affairs. He was, however, offered his choice of offices by President Washington and, as previously stated, he chose the judiciary. The following letters so admirably state the offer and acceptance that they are quoted in full.²¹ Washington wrote:

It is with singular pleasure that I address you as Chief Justice of the Supreme Court of the United States, for which office your commission is enclosed.

In nominating you for the important station, which you now fill, I not only acted in conformity with my best judgment but I trust I did a grateful thing to the good citizens of these United States; and I have a full confidence that the love which you bear to our country, and a desire to promote the general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge, and integrity which are so necessary to be exercised at the head of that department which must be considered as the keystone of our political fabric.

To this letter, Jay replied as follows:

When distinguished discernment and patriotism unite in selecting men for stations of trust and dignity, they derive honour not only from their offices, but from the hand which confers them.

With a mind and a heart impressed with these reflections,

²¹ Correspondence and Public Papers, vol. III, 378-379.

and their correspondent sensations, I assure you that the sentiments expressed in your letter of yesterday and implied by the commission it enclosed, will never cease to excite my best endeavours to fulfill the duties imposed by the latter, and as far as may be in my power, to realize the expectations which your nominations, especially to important places, must naturally create.

With most men the chief-justiceship would be the culmination of a career; with Jay it was merely an incident.

It is certain that the trend of his mind was judicial, and although he had been busy with matters political and diplomatic, it is probable that they strengthened rather than weakened his powers of legal reasoning. He never was a partisan in the one-sided sense of the word, and he never decided any matter without a careful examination of the conflicting aspects in which it presented itself. He was in this sense a judge all his life. The opportunity was, however, never his to make much law from the bench. Chief-Justice of an empty court, he left it before cases of great importance arose, and there are very few opinions by which the range and breadth of his mind, the extent and depth of his legal learning, can be judged.

A much-admired charge to the grand jury, delivered on the 4th of April, 1790, attests the gravity with which he approached the subject and his conception of the form of liberty consistent with law:

It cannot be too strongly impressed on the minds of us all how greatly our individual prosperity depends on our national pros-

perity, and how greatly our national prosperity depends on a well organized vigorous government, ruling by wise and equal laws, faithfully executed; nor is such a government unfriendly to liberty—to that liberty which is really inestimable; on the contrary, nothing but a strong government of laws irresistibly bearing down arbitrary power and licentiousness can defend it against those two formidable enemies. Let it be remembered that civil liberty consists not in a right to every man to do just what he pleases, but it consists in an equal right to all the citizens to have, enjoy, and to do, in peace, security, and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good. It is the duty and the interest, therefore, of all good citizens, in their several stations, to support the laws and the government which thus protect their rights and liberties.

There is also a charge of the Chief-Justice in the case of Gideon Henfield,²² in which he assigned to the Presidential Proclamation of neutrality the force of law independently of any act of Congress “defining and punishing offenses against the law of nations.” Jay was indisputably right in his statement that the law of nations is part of the common law of England and of the United States, and his doctrine of neutral duty as defined by the law of nations was correct; but it is definitely settled, contrary to the contention of the Chief-Justice, that there is no Federal common law in criminal cases; for “the legislative authority of the Union must first make an act

²² Wharton's State Trials, 49 *et seq.* This is not quite accurate, for the Chief-Justice delivered his charge anterior to the trial in question, but Jay's charge is the basis of the prosecution as it was of the charge of the presiding judge, James Wilson.

a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.”²³

In the case of *Georgia vs. Brailsford*, in 1794,²⁴ the judgment was clearly right, but the statement of the Chief-Justice that the jury was judge of the law as well as the facts, is open to serious doubt. The law of the case was of great importance. One Brailsford was a British subject residing in Great Britain, and a bond was executed to him by Kensall and Spalding, citizens of Georgia. The State claimed the bond by virtue of its confiscation act

²³ *United States vs. Hudson*, 7 Cranch's Reports 32 (1812). In the case of the *United States vs. Ravara*, 1794, 2 Dallas's Reports, p. 297, the Chief-Justice applied in person the doctrine, and a conviction was actually had on the same erroneous indictment and instruction.

This view of the Chief-Justice was shared by his contemporaries and as an original proposition has not a little to commend it. Chief-justice Ellsworth was of the same opinion and the question has more than an academic interest. On this Wm. Garrott Brown says:

“See the speeches and letter of Parker and Roosevelt, accepting their respective nominations for the presidency in 1904. It seems curious that in the renewal of an old controversy more use was not made of Ellsworth's charge in the case of *Williams*, or of the contrary view set forth in *United States vs. Hudson* (7 Cranch's Reports, 32) and still more clearly in *Wheaton vs. Peters* (8 Peter's Reports, 391). The Court's opinion in the latter case contains this language — doubtless a correct statement of the law: ‘It is clear that there can be no common law of the United States. . . . When therefore, a common law right is asserted, one must look to the State in which the controversy originated.’” *Life of Oliver Ellsworth*, p. 260, note.

The curious reader will find this interesting subject discussed in considerable detail in an elaborate note to the case of *Gideon Henfield* (1793) as reported in Francis Wharton's *State Trials*, pp. 49, 85-89.

²⁴ See Flander's account of the case in his *Lives of the Chief-Justices*, vol. I, 392-393; also, 2 Dallas's Reports, 403.

which sequestered all debts, dues, and demands owing to residents of Great Britain. On friendly suit by Georgia, Jay held, and rightly, that the conclusion of peace revived Brailsford's right to sue and that the provisions of the treaty of peace, as the law of the land, vested in Brailsford the rights which he might otherwise have lost by the act of confiscation. This decision is sound and in accordance with all subsequent cases on the subject.²⁵

But by far the most famous and important case in Jay's time was *Chisholm vs. Georgia*,²⁶ in which the Chief-Justice held that a state of the Union was suable in the Supreme Court at the instance of a private suitor of a sister state.²⁷ From this judgment Mr. Justice Iredell dissented, and time as well as the XI Amendment to the Constitution sustains the dissent. The reasoning of the case is, however, unanswerable, although the Amendment forbade suit at the instance of a private citizen. For say what we will the states are not sovereign in an unlimited sense, and when we admit this the result is something less than sovereignty. The nation is supreme, as was shown in 1861, and if the nation is supreme the individual states composing the nation cannot be.

The writer is not unaware that the 81st Number of

²⁵ *Hamilton vs. Eaton*, 2 Martin's North Carolina Reports, 83 (1796), per Ellsworth, C. J.; *Ware vs. Hylton*, 1796, 3 Dallas's Reports, 199.

²⁶ 2 Dallas's Reports, 419 (1793).

²⁷ The opinion of the Chief-Justice is also printed in full in *Correspondences and Public Papers*, vol. III, 453-471.

The Federalist denies that a State of the Union was suable at the instance of a private suitor. The fact that a State is suable by another State in the Supreme Court does away with the idea of sovereignty although it preserves equality of States within the Union.

The fact that a State might be sued against its sovereign will deprives it of a sovereign privilege to that extent. The fact that a State as the trustee of its citizens might sue another State in the Supreme Court is decisive; for if the State may be sued at all, suit by State or private citizen is reduced to the minor question of the proper party to institute the suit. If the right of action exists, the person of the actor is a minor point.

The famous decision of *McCulloch vs. Maryland*, 1819,²⁸ is largely a restatement of Jay's opinion, and it is on the opinion of *Chisholm vs. Georgia* that Jay's claim to greatness as a judge must rest. It gave him an opportunity to consider a fundamental question of constitutional law and he considered it broadly from the standpoint of statesman as well as judge. This one careful opinion, notwithstanding it was written in the press and stress of business and hasty composition, places Jay in the category of great judges. Constitutional amendments are not usually required to check inferior minds or patent error.

The clean-cut language of Judge Cooley, no mean authority in matters of constitutional law, should be

²⁸ 4 Wheaton's Reports, 316.

borne in mind by those who question Jay's ability as a judge ²⁹

After this clear and authoritative declaration of national supremacy, the power of a court to summon a State before it at the suit of an individual, might be taken away by the amendment of the Constitution — as was in fact done — without impairing the general symmetry of the federal structure, or inflicting upon it any irremediable injury. . . . The Union could scarcely have had a valuable existence had it been judicially determined that powers of sovereignty were exclusively in the States or in the people of the States severally. . . . The doctrine of an indissoluble Union, though not in terms declared, is nevertheless in its elements at least contained in the decision. The qualified sovereignty, national and State, the subordination of State to nation, the position of the citizen as at once a necessary component part of the federal and of the state system, are all exhibited. It must logically follow that a nation, as a sovereignty, is possessed of all those powers of independent action and self-protection which the successors of Jay subsequently demonstrated were by implication conferred upon it.

The decision was not merely a promise; it was a demonstration of great power. What years of experience on the bench would have produced, it is futile to say; but the country is to be congratulated that when Jay laid aside the ermine he was after a few years of *interregnum* succeeded by Marshall, whose judgments it may be said, following the lines of *Chisholm vs. Georgia*, created a nation from scattered and discordant states.

It has been remarked that Jay began the study of

²⁹ Quoted in Pellew's *Life of Jay*, pp. 254-255.

law by a careful study of Grotius, and that his mastery of international law is evident throughout his whole career. The late W. E. Hall was no lover of America, but he assigns to the United States the credit of declaring and establishing the modern doctrine of neutrality. Washington's Proclamation of neutrality is classic, and the hand that drew it was Jay's.³⁰ In a letter to Hamilton, dated April 11, 1793, Jay enclosed a draft of a proclamation and on the 22d of the month Washington issued the epoch-making proclamation in a more general and condensed form.³¹ The elaborate charge to the grand jury at Richmond, Virginia, May 22, 1793, expounded at length and correctly the doctrine and duties of neutrality.³² This government has always since adopted the principles there stated by Jay; besides including them in the treaty of Washington. The fact that the violation of the law of nations was held, as part of the law of the land, indictable according to the forms of the common law in the absence of a statutory penalty, does not invalidate the correctness of the law as laid down. The charge was properly regarded as a great effort and its publication in pamphlet form did much to prevent the violation of the law of nations as correctly understood and expounded. And in the case of *Glass vs. The Sloop*

³⁰ Correspondence and Public Papers, vol. IV, 474-477.

³¹ Richardson's Messages and Papers of the Presidents, vol. I, 156-157.

³² Correspondence and Public Papers, vol. IV, 478-485.

Betsey, in 1794,³³ the Chief-Justice, in delivering a unanimous opinion, correctly held that:

No foreign power can of right institute, or erect, any court of judicature of any kind within the jurisdiction of the United States, but such only as may be . . . in pursuance of treaties. It is therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted, is not of right.

It would be an oversight to pass unnoticed the fact that Jay performed a genuine service to the country in bottoming the rules of the practice of the court upon English common law and chancery. Nor should his solicitude for the regulation of admiralty in the matter of prizes be overlooked. When in England in 1794, he requested the opinion of Sir William Scott on this subject. To quote his language:

It appeared to me advisable that our people should have precise and plain instructions relative to the prosecution of appeals and claims, in cases of capture. For that purpose I applied to Sir William Scott, and requested him, in concert with Dr. Nicholl, to prepare them. We conversed on the subject, and I explained to him my views and objects.

The letter from Lord Stowell (then Sir William Scott, and later the glory of the admiralty bench) has been the basis of our law and practice on the subject.³⁴

³³ Dallas's Reports, p. 6.

³⁴ See Wheaton: the Law of Maritime Capture, Appendix, pp. 309-340.

Before leaving his services as judge two matters should be referred to; taken together, they establish the principle of the separation of the court from the legislative and executive branches of the government.

First as to the independence of the legislature.³⁵

In April (1791) the Circuit Court for the District of New York, with Jay presiding, agreed unanimously to a protest against an act of Congress providing that applications for invalid pensions should be passed on by the judges of the Supreme Court in their respective circuits. The protest declared that Congress could not assign to the judiciary "any duties but such as are properly judicial, and to be performed in a judicial manner. That the duties assigned to the Circuit Courts by this act are not of that description . . . inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the legislature; whereas, by the Constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, is authorized to sit as a court of errors on the judicial acts or opinions of this court. Accordingly when the question came before the court on a motion for a mandamus in Hayburn's case, before a decision was given, the obnoxious act was repealed. Practically the court had declared for the first time an act of Congress unconstitutional.

Finally as to the independence of the Executive.³⁶

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month (regarding) the lines of separation drawn by

³⁵ Pellew's *Life of Jay*, p. 240.

³⁶ Correspondence and Public Papers, vol. III, 488-489. It is true that this utterance was in the nature of a personal opinion, but it

the Constitution between the three departments of the Government. These being in certain respects checks upon each other, and our being judges of the court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *Executive* department.

We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.

As indicated this letter was written in reply to a request for legal advice.

showed the attitude of the court. The following authoritative note is taken from Thayer's Cases on Constitutional Law, vol. IX, 105:

"For the early cases in the Federal Courts, see Meigs, 19 Am. Law Rev. 186. The case in the text [Vanhorne's Lessee vs. Dorrance, 1795, 2 Dallas's Reports, 304] appears to be the earliest Federal decision. The informal utterances of the Circuit Court Judges, in letters and memoranda, reported in the note to Hayburn's Case, 4 Dall. 409, in 1792, announce their opinions, that an Act of Congress of March 23, 1792 (1 St. at Large, 243), was unconstitutional; just as Chief-Justice Jay and several of the judges of the Supreme Court, in 1790, in a letter intended for the President, had made a declaration as to a part of the Judiciary Act of 1789. See 4 Am. Jurist, 293; 2 Story, Const. s. 1579, note. But in these there was no *judicial* utterance. In the case of Yale Todd (February, 1794), preserved in a note to U. S. vs. Ferreira, 13 How. 52, it was decided that the theory of the legislation of March 23, 1792, adopted by some of the judges, *viz.*, that it gave them authority to act as commissioners, was untenable. It is inaccurate to say that this case holds the Act of 1792 to be unconstitutional, as appears to be said in the note in 13 How. 52, and as is expressly said in the Reporter's note in 131 U. S., Appendix, ccxxxv. Marbury vs. Madison is the earliest Federal decision in the Supreme Court."

It would therefore appear that short as was Jay's service on the bench, his chief-justiceship was nevertheless of great importance and that he fully justified the appointment.

By the year 1794, the situation with Great Britain had become so critical and strained that war seemed the natural and far from impossible result. Our country was drunk with a frenzy for France and although Washington was able to prevent direct violations of neutrality, he was unable to restrain the license of the press and the mistaken but genuine outbursts of sympathy with France and its Revolution. "Citizen" Jefferson and his party saw the road to office and preferment loom up before them, if only the democracy could speak the word, and in a few years the democracy found both voice and vote. Great Britain was never particularly proud of the peace of 1783, and while it generally observed the letter, other than in the retention of the frontier posts, the spirit of the treaty was absolutely disregarded. The commercial policy of Great Britain was as ruinous to the United States as it was insupportable. The wild enthusiasm for things French and consequent disapproval of Great Britain and its policy exercised a far from soothing effect, and the two nations were slowly but surely drifting into a state of feeling that always forbodes war. "Peace," said Washington, "ought to be pursued with unremitting zeal before the last resource, which has often been the scourge of nations and cannot fail to check

the advancing prosperity of the United States, is contemplated."³⁷

To avert this misfortune, perhaps, catastrophe, John Jay was selected for the difficult task of special envoy to Great Britain. The Chief-Justice was under no delusion as to the effect of the mission upon his popularity; for peace could be bought only by concession, and concession of any kind, given the temper of the country, meant a sacrifice of popularity. Pellew says:³⁸

The learned Dr. Carnahan, who became President of Princeton College in 1823, in his lectures on moral philosophy used to quote a conversation between Jay and some friends at this time that was told him by an ear-witness, as a striking instance of courageous patriotism: "Before the appointment was made, the subject was spoken of in the presence of Jay, and Jay remarked that such were the prejudices of the American people, that no man could form a treaty with Great Britain, however advantageous it might be to the country, who would not by his agency render himself so unpopular and odious as to blast all hope of political preferment. It was suggested to Mr. Jay that he was the person to whom this odious office was likely to be offered. 'Well,' replied Mr. Jay, 'if Washington shall think fit to call me to perform this service, I will go and perform it to the best of my abilities, foreseeing as I do the consequences to my personal popularity. The good of my country I believe demands the sacrifice, and I am ready to make it.'" In a similar spirit he wrote to his wife, April 15: "The object is so interesting to our country, and the combination of circumstances such, that I find myself in a dilemma between personal and public consider-

³⁷ Writings of Washington, vol. X, 404.

³⁸ Pellew's Life of Jay, pp. 267-268.

ations." And again: "Nothing can be more distant from every wish on my own account. . . . This is not of my seeking; on the contrary, I regard it as a measure not to be desired, but to be submitted to." His acceptance he explained a few days later: "No appointment ever operated more unpleasantly upon me; but the public considerations which were urged, and the manner in which it was pressed, strongly impressed me with a conviction that to refuse it would be to desert my duty for the sake of my ease and domestic concerns and comforts."

The situation was difficult, for Great Britain retained the western ports; the boundaries of the west and north coast were unsettled, and Great Britain had made no compensation for the negroes carried away. On the other hand, our country had not treated British merchants fairly in the matter of debts contracted before the Revolution. Then, too, Great Britain claimed that France had fitted out privateers with which to injure British commerce, and America claimed damages for unlawful captures by British cruisers.

Jay landed in England on June 8, 1794, and on November 19th of the same year a treaty was signed. The treaty as a whole was admirable and Jay deserved hardly less honor for the treaty of 1794 than for the treaty of 1783. In a way the later treaty was the greater achievement, for the treaty of 1783 merely put an end to a war that was practically non-existent; whereas, the treaty of 1794 prevented the outbreak of a war that threatened daily. The commercial clauses were, and since have been, severely criticised, but it must be remembered that this coun-

try had then no treaty of commerce with Great Britain, and that the concessions, however inadequate, were still concessions and therefore advantageous. It should also be borne in mind that the opposition to the treaty in Great Britain was hardly less marked, owing to a mistaken belief that a surrender was made without any adequate return.

But to pass to another aspect of the case, the judicial mind of John Jay was seen in his handling of the claims of the citizens of the respective countries. The question of fact is always the one great difficulty; the application of the principle of law to the facts when found is comparatively simple. To settle rightly and thus permanently, the treaty provided in Article VI for the appointment of a board of five commissioners to meet at Philadelphia to ascertain the facts, and a board of five commissioners at London to assess the damages, in the absence of adequate remedy at law, "according to the merits of the several cases, and to justice, equity, and the law of nations."³⁹ Under this clause American citizens received an award of \$10,345,000.

Mr. Pellew comments on the Treaty as follows:⁴⁰

To unprejudiced eyes after the lapse of a hundred years, considering the mutual exasperation of the two peoples, the pride of England in her successes in the war with France, the weakness and division of the United States, the treaty seems a very fair one. Certainly one far less favorable to America would have been

³⁹ See Moore's *International Arbitration*, vol. I, chap. 9.

⁴⁰ Pellew's *Life of Jay*, pp. 279-280.

infinitely preferable to a war, and would probably in the course of time have been accepted as being so. The commercial advantages were not very considerable, but they at least served as 'an entering wedge,' to quote Jay's expression, and they were *pro tanto* a clear gain to America. Some such thoughts may have been in Lord Sheffield's mind when, at the breaking out of the war of 1812, he remarked: "We have now a complete opportunity of getting rid of that most impolitic treaty of 1794, when Lord Grenville was so perfectly duped by Jay." And it is significantly admitted by the latest biographer of the Democratic hero, Andrew Jackson, that "Jay's treaty was a masterpiece of diplomacy, considering the time and circumstances of this country."

The truth of the whole matter was probably expressed as well as ever by Lord Grenville to Jay, in 1796: "It is a great satisfaction to me, when, in the course of so many unpleasant discussions as a public man must necessarily be engaged in, he is able to look back upon any of them with as much pleasure as I derived from that which procured me the advantage of friendship and intercourse with a man valuable on every account . . . I, on my part, should have thought that I very ill consulted the interests of my country, if I had been desirous of terminating the points in discussion between us on any other footing than that of mutual justice and reciprocal advantage; nor do I conceive that any just objection can be stated to the great work which we jointly accomplished, except on the part of those who believe the interests of Great Britain and the United States to be in contradiction with each other, or who wish to make them so."

We may conclude this discussion of the Treaty with the two following quotations from the same authority. They appear to sum up at once the view of the country on the one hand, and Jay's own opinion endorsed as it is by posterity on the other.⁴¹

⁴¹ Pellew's Life of Jay, pp. 282, 283.

James Savage, once president of the Massachusetts Historical Society, told his grandson that he remembered seeing these words chalked in large white letters around the enclosure of Mr. Robert Treat Paine:—

“Damn John Jay! Damn every one that won’t damn John Jay!! Damn every one that won’t put lights in his windows and sit up all night damning John Jay!!!”

Throughout the storm of vituperation Jay himself remained calm and philosophical. “As to my negotiation and the treaty,” he wrote to Judge Cushing, “I left this country well convinced that it would not receive anti-Federal approbation; besides, I had read the history of Greece, and was apprised of the politics and proceedings of more recent date.” “Calumny,” he said again, “is seldom durable; it will in time yield to truth.” He had at least done his duty, though by so doing he very possibly lost the presidency of the United States.

Then, as always, the pious ejaculation of Fisher Ames commends itself to the thoughtful: “Lord, send us peace in our day, that the passions of Europe may not inflame the sense of America.”

As on his previous return from Europe, he found a new office awaiting him, for during this absence he was elected governor of New York. This was not the first time he was elected, for in 1792 he had been counted out in a way which indicates that even the present cannot be much worse than the past. The immediate result of the acceptance of the governorship was his resignation from the bench, and although the chief-justiceship was urged upon Jay upon the retirement of Ellsworth he never again exercised the duties of the position.⁴²

⁴² Pellew's *Life of Jay*, p. 301. See the correspondence in full in “Correspondence and Public Papers, vol. X, 284–286.

"I had no permission from you," said President Adams, "to take this step, but it appeared to me that Providence had thrown in my way an opportunity, not only of marking to the public the spot where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security its inhabitants afforded against its increasing dissolution of morals." "I left the bench," Jay replied, "perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system. . . . Independent of these considerations, the state of my health removes every doubt."

Of Jay's six years' tenure of office from 1795-1801, for he was re-elected in 1798, there is little to say. He administered the affairs of state with the same zeal and care that he always displayed in office. It will not be surprising to learn that he refused to act the partisan even in the slightest degree, for although his opponent Clinton had been in office continuously from 1777 until 1795, and notwithstanding that all positions were filled by political opponents, Jay neither made a political appointment nor made a single political removal during the entire six years of his governorship.⁴³ The one measure of his administration which must have pleased Jay most was the passage, in April, 1799, of an act of

⁴³ Jay's *Life of Jay*, vol. I, 292; Flander's *Life and Times of the Chief-Justices*, vol. I, 416.

emancipation. The following is Mr. Pellew's account of the act and its provisions:

It was provided that all children born of slave parents after the ensuing 4th of July should be free, subject to apprenticeship, in the case of males, till the age of twenty-eight, in the case of females till the age of twenty-five, and the exportation of slaves was forbidden. By this process of gradual emancipation there was avoided that question of compensation which had been the secret of the failure of earlier bills. At that time the number of slaves was only 22,000, small in proportion to the total population of nearly a million. So the change was effected peacefully and without excitement. Jay himself was a slaveholder in a certain sense. "I have three male and three female slaves," he wrote in a return of his property to the Albany assessors, November 8, 1798; "five of them are with me in this city, and one of them is in the city of New York. I purchase slaves and manumit them at proper ages, and when their faithful services shall have afforded a reasonable retribution." Perhaps the governor's practice in this respect may have suggested the practical manner of emancipation.

We now come to the third and final period of his life. For fully twenty-three years Jay had contemplated retirement from public affairs. As president of Congress he wished to withdraw; after the negotiation of the Treaty of Independence he wished to devote himself to the practice of law and his duties as a citizen. But there was always some public reason that prevented him from fulfilling what must be considered his heart's desire. And in the very last year of his governorship he was besought to remain before the public. His friends urged in vain that he run again for governor; President Adams laid the

chief-justiceship at his feet but Jay would none of it.⁴⁴

With the governorship, Jay's public career closed, and he never seems at any subsequent period to have desired place and position. Indeed he never was a candidate in the sense that he forced himself into notice, although he did not hang back and positively refuse in his younger days. There is perhaps no more signal instance in the history of the country of the office seeking the man, and there is assuredly no instance of greater fidelity to the trust imposed. Mistakes of judgment may be pointed out, as in his willingness to yield to Spain in the matter of the navigation of the Mississippi, in a commercial clause or two of the treaty of 1794, and in his deliberate view of the unimportance and comparative failure of the Supreme Court; but it may be confidently asserted that his honesty and disinterestedness are beyond the breath of suspicion, or the possibility of question.

If there is a lack in his public career it is a lack of warmth and a failure of imagination that stamp him as inferior to his younger but greater contemporary, Hamilton. But in the quality of judgment he was certainly Hamilton's superior, and in the fine balancing and weighing of his relations to the public he was strangely like Washington. There is so little of human frailty in either that they must always remain apart; apart from their contemporaries, and apart

⁴⁴ The letters between Adams and Jay are very interesting in themselves, but the material portions of them have already been quoted.

from the world in which they lived. It is improbable that any venturesome publisher will ever attempt the "true" life of John Jay.

The twenty-eight years of his retirement were devoted solely to his home circle, and the peaceful pursuits of a country gentleman, in which there is little to record. He was a devoted churchman and the president of the American Bible Society. He renewed the acquaintances of his youth and corresponded with old friends. Naturally grave, he became in old age taciturn, and there is little account of conversations with family or friends. Any other man who had led his active life in the forefront of public affairs would have grown restless. Not so Jay. He longed for repose and silence and his retreat in Bedford seems to have supplied both. In a letter to his fellow law student, Lindley Murray, he calls attention to the pleasurable nature of his situation.

Being retired from the fatigues and constraints of public life, I enjoy with real satisfaction the freedom and leisure which has at length fallen to my lot. For a long course of years I have been looking forward with desire to the tranquil retirement in which I now live, and my expectations from it have not been disappointed. I flatter myself that this is the inn at which I am to stop in my journey through life. How long I shall be detained is uncertain, but I rejoice in the prospect of the probability of being permitted to pass my remaining time in a situation so agreeable to me. Do not conclude from this that I am without cares and anxieties exclusive of those which are more or less common to all men. The truth is, that although in numerous respects I have abundant reason to be thankful, yet in others I experience the necessity and the value of patience and resignation.

There is perhaps no finer exhibition of the resignation spoken of in this letter than in his conduct on learning of the fraudulent practices by which he was cheated out of the governorship. "My robe may become useless, or it may not. I am resigned to either event. He who governs all makes no mistakes, and a firm belief of this would save us from many." And in a letter to Rufus King, he says:⁴⁵

The reflection that the majority of electors were for me is a pleasing one; that injustice has taken place does not surprise me, and I hope will not affect you very sensibly. The intelligence found me perfectly prepared for it. . . . A few years more will put us all in the dust, and it will then be of more importance to me to have governed myself, than to have governed the State.

The event which he had constantly in mind and to which he looked forward with a fond and chastened pleasure, took place on May 14, 1829.

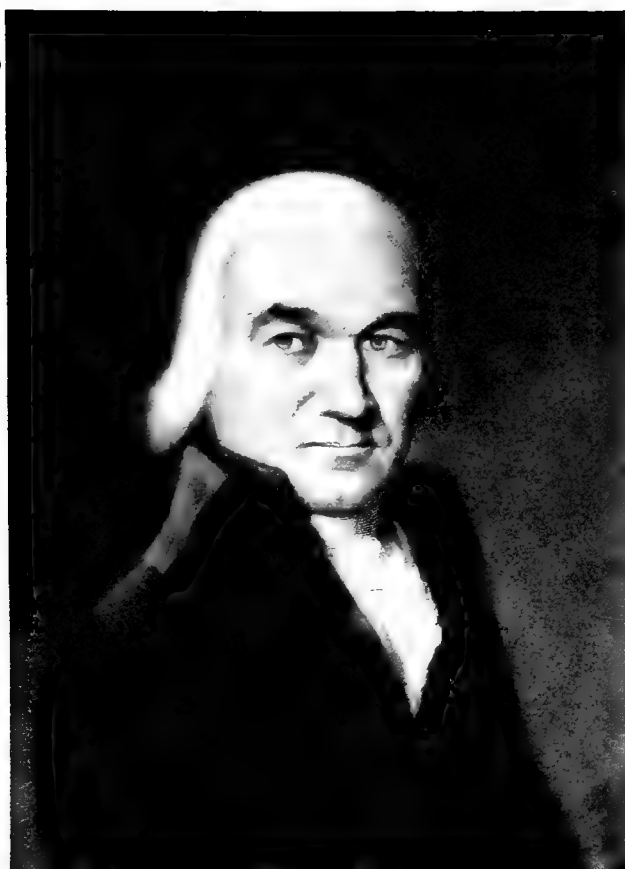
⁴⁵ Jay's *Life of Jay*, vol. I, 289.

OLIVER ELLSWORTH.

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OLIVER ELLSWORTH

From a crayon by James Sharpless, in possession of Mr. Roland Gray of Boston.



OLIVER ELLSWORTH.

1745-1807.

BY

FRANK GAYLORD COOK,

of the Massachusetts Bar.

OLIVER ELLSWORTH narrowly missed being a minister. Born at Windsor, Connecticut, April 29, 1745, he was reared in influences and circumstances that bore him toward the ministry. Through this calling opened paths of knowledge and influence. It was as yet the sole learned profession. For it the colleges at Cambridge and New Haven had been founded and still mainly existed. And it still furnished and contained most of the leaders in thought and society.

Such a career appealed to his parents. They felt for it that respect and even reverence that had characterized several generations of his Puritan ancestors. The Ellsworths had dwelt on the same spot since 1665¹ and during that time had been men of property and of good repute, active and faithful in the affairs of the town and the church. Oliver's father, David Ellsworth, besides being a well-to-do farmer and an oft-elected selectman, had acquired the title and dignity

¹ Old Windsor, by Henry B. Stiles, vol. I, 155.

of captain by leading a company of Windsor men at the siege of Louisburg. He early desired his son to be a minister and to this end, having ample means, directed his education. That the boy might be prepared for college he was placed in the charge of Reverend Joseph Bellamy, pastor of the church at Bethlehem, a little hill town about thirty miles southwest of Windsor. Dr. Bellamy was a graduate of Yale, and was already widely known by his work "True Religion Delineated." In a long career he became one of the most learned and celebrated divines of his day. He was in the habit of eking out his slender salary—originally ninety pounds sterling and fifty cords of firewood—by receiving into his family young men in preparation for college.

Thus fitted Oliver Ellsworth entered Yale in 1762. His conduct there did not promise well for the fulfillment of his father's plan, although in some respects it did not differ from that which proverbially characterizes students of divinity. To be sure the course of study was suited to the purpose and characteristic of the times. The laws of the college read: ²

In the first year, They Shall principally Study the Tongues and Logic, and Shall in Some measure pursue the Study of the Tongues the Two next Years. In the Second Year They Shall Recite Rhetoric, Geometry and Geography. In the Third Year Natural Philosophy, Astronomy and Other Parts of the Math-

² Laws of Yale College, 1745.

ematticks. In the Fourth Year Metaphysics and Ethics . . . but every Saturday Shall Especially be allotted to the Study of Divinity.

But there was much irritation over the food served in commons, and with some cause even in those frugal times, if we may judge from regulations³ existing about that time. For however substantial the dinner may be, one loaf of bread for breakfast and an apple pie and a quart of beer for supper could hardly be deemed a reasonable allowance, when divided among four growing, energetic youths.

The long administration of President Thomas Clap was ending in lax discipline and much disorder, and young Ellsworth appears to have caught the contagion of mischief. In July, 1763, he was fined one shilling, because he united with others "to scrape and clean the college yard"—whatever that offense may have been—because he joined with some comrades in "having a treat or entertainment last winter," and because he and three others "presently after evening prayers on Thursday last, put on their hats and run and hallooed in the College Yard in contempt of the Law of College." Again, the next year, he was charged with being present "at Bulkley 2s," at "a general treat or comotation of wine both common and spiced in and by the sophomore class," and was fined four shillings. Soon afterward the conclusion was reached that he might study more profitably elsewhere. For, as is re-

³ F. B. Dexter, *Yale Biographies and Annals*, Second Series, p. 141; Kingsley, *Yale College*, vol. I, 297-306.

corded in President Clap's official journal under the date of July 27, 1764, "Oliver Ellsworth and Waightstill Avery, at the desire of their respective parents, were dismissed from being members of this College."⁴

The young men at once transferred their residence to Nassau Hall, now Princeton University. The change proved fortunate. This institution, though younger and smaller than Yale, at that time afforded better discipline and associations. It was flourishing under the presidency of Reverend Samuel Finlay, D. D., who had justly become celebrated, as a preacher, teacher, and executive, in spite of much early hardship and notoriety. A native of Ireland, he had come to America in 1734, and had become a zealous itinerant preacher,—sometime associated with Whitefield. At that time the Connecticut General Assembly, to guard the rights of its ministry, had passed a law that no one should preach in any parish without the consent of its pastor. And Dr. Finlay, preaching in New Haven in defiance of this law, was forcibly ejected from the colony as a vagrant. A character of such spirit must have appealed to young men. In his comrades Ellsworth was equally favored, in view of his father's wishes and of his future career. Singularly enough, either in his own class or in classes shortly before or after his, were the following men with whom he was subsequently associated in public service in state or

⁴ W. G. Brown, *Life of Oliver Ellsworth*, pp. 15-16.

national affairs; namely, Luther Martin, of Maryland; Gunning Bedford, of Delaware; William Paterson, of New Jersey; James Madison, of Virginia, and Tapping Reeve, of Connecticut. Of the students not afterward prominent in public life, about one-half were preparing for the ministry. At the same time public speaking and English composition were popular studies, and the Stamp Act was a fruitful topic of discussion.

Evidently Ellsworth felt the drift of young men at this time toward public life. For, although upon his graduation in 1766 the plan of entering the ministry still survived, and he was kept for a year in the study of theology under the guidance of the Reverend John Smalley of New Britain, it had to be given up. Dr. Smalley, who had lately published a book on "Natural and Moral Inability" may have found in his pupil an example under that theme. For it is said that, when the young man was directed to prepare his first sermon, he devoted the first ten sheets to the definition of his terms. Clearly he had no "call" to the ministry; and at last, with his father's consent, he yielded to his growing inclination for the law.

If he realized the difficulties he was to encounter, he might well have hesitated. There was no regular school for the study of law. Over a decade elapsed before his fellow collegian, Tapping Reeve, in 1784, inaugurated at Litchfield, Connecticut, the first law school in New England. Indeed it was difficult

to determine what the law was. To be sure the statutes enacted by the General Assembly of the Colony circulated in print freely among the people. Since 1727 the acts of each session had been printed and circulated immediately after its adjournment. But as to the common law there was great uncertainty. There were treatises in Latin on the common law of England; and there were Bacon's Abridgment, and Jacob's Law Dictionary. There were also reports of decisions rendered in the courts of England, many of them untrustworthy for inaccuracy, but these books could be obtained only by importation and at great expense. Blackstone's Commentaries, which would have made the task of mastering the elementary principles of the common law comparatively easy, were not published in America till about 1771, the year of Ellsworth's admission to the bar.

Even when the English common law had been laboriously learned from these limited sources, it was not fully applicable to Connecticut. That colony had never adopted the common law of England by statute.⁵ Some parts of it she had expressly repudiated. That law had however gradually and largely crept in through the decision of the colonial courts, till it was generally recognized so far as it was consistent with local customs and enactments. Thus had grown up a Connecticut common law, but in

⁵ Judicial and Civil History of Connecticut, by Loomis and Calhoun, p. 82.

great uncertainty. No digest of it had yet been written; and the decisions of the colonial courts were not yet reported.

The path to the knowledge of the law, therefore, when Ellsworth prepared, was arduous and devious. It was customary for the student to enter the office of a practicing attorney, using such books as he might find, and to attend the sessions of the courts, taking copious notes for his own use. In following this custom Ellsworth was again singularly fortunate in his instructors. He began the study of the law under Matthew Griswold, later governor of Connecticut; and he continued it under Jesse Root, who, graduating from Nassau Hall in 1756, had preached for three years, and finally settled in the practice of law in Hartford County. The latter and Ellsworth, perhaps drawn together partly as alumni of the same college with similar experience, thus began an association that continued, in various forms,—as practitioners at the same bar, co-representatives in Congress, and successors one of the other upon the bench,—until they ended their public careers about the same time, one by resignation and the other by death in the office of chief-justice of their native state.

Both men contributed to the establishment of the bar. When they began to practice—a few years before the war for independence—the legal profession was only just gaining public recognition and respect. In the founding of the Colony, apparently, it was not

needed or desired. Among the early settlers only the brilliant but erratic Roger Ludlow had a legal education, obtained at the Inns of Court; and although his technical knowledge and skill were employed for framing the Code of 1650,⁶ still advocacy was not encouraged. Early in the eighteenth century, however, it obtained a foothold. In 1708 was passed the following as the first act admitting attorneys to practice:⁷

For the better regulating proceedings and pleas at the bar . . . it is ordained That no person except in his own case shall be admitted to make any plea at the Bar without being first approved of by the Court before whom the plea is to be made, nor until he shall take in said Court the following oath, namely:— You shall do no falsehood nor consent to any to be done in the Court, and if you know of any to be done you shall give knowledge thereof to the Justices of the Court or some of them, that it may be reformed. You shall not wittingly and willingly promote, sue, or procure to be sued, any false or unlawful suit, nor give aid or consent to the same. You shall delay no man for lucre or malice but you shall use yourself in the office of an attorney within the Court, according to the best of your learning and discretion, and with all good fidelity as well to the Court as to the client. So help you, God.

Upon taking this oath, the applicant was admitted to practice. As yet no examination of his knowledge of the law was prescribed. From the following act passed in 1730, it would appear that the privilege of practicing was abused.⁸

⁶ Judicial and Civil History of Connecticut, pp. 64, 182.

⁷ Judicial and Civil History of Connecticut, p. 182 *et seq.*

⁸ Judicial and Civil History of Connecticut, p. 182 *et seq.*

Whereas many persons of late have taken it upon themselves to be attorneys at the Bar so that quarrels and lawsuits are multiplied, and the King's good subjects disturbed; to the end therefore that said mischief may be prevented, and only proper persons allowed to plead at the Bar . . . and that the fees of attorneys may be stated, and known and for the better regulating all pleadings at the Bar, Be it enacted . . . That there shall be allowed in the Colony eleven attorneys and no more — three attorneys in the County of Hartford, and the other four counties to have two attorneys to plead at the Bar in each respective County and no more, which attorneys shall be nominated and appointed from time to time, as there shall be occasion, by the County Courts. . . . That in all cases where land is not concerned, and the demand is not over ten pounds no more than two attorneys may plead — one for each party. But where land is concerned, or the demand is over ten pounds, each party may have two attorneys and no more. That the attorney's fees at the County and inferior courts in each action . . . shall be ten shillings and no more, and at the Superior Court, twenty shillings and no more, to be taxed against the loser for the winner, and that such attorneys shall be under the eye of the Court, and be subject to be disbarred.

This law appears to have gone too far. For the next year attorneys were relieved from military service, and the restriction on their number was repealed. Thenceforth during the forty years that elapsed before Ellsworth's admission to the bar, attorneys gained rapidly in the public estimation. They became more and more a necessity as the volume and variety of business increased. But the professional feeling or spirit and ideals developed slowly. Practice was limited, unremunerative, and intermittent. Usually the lawyer's office was at his

home, and he would eke out his scanty and precarious income at the bar by engaging in farming or in some other manual labor. When the court sat in his county he would be constant in attendance even though he had no case to be tried. He would take careful notes on the cases tried, the questions of law and practice raised, and the decisions rendered; and he would mingle socially with the other lawyers and with the judges in attendance, thus extending his acquaintance and reputation. When the term ended he would return to his farm or his forge, to ponder and to plod.

Such was the experience of Ellsworth as he began to practice law. He had laboriously to make his way with his attention divided and distracted. It would appear that his father, failing to place him in the pulpit, left him thereafter to shift for himself. However this may be, in preparing for the bar he had incurred debt; and his sturdy honesty and resolution were shown in his determination first of all to pay it. He had acquired—in what way it is not clear—a small tract of woodland on the Connecticut river, and he now tried to dispose of the standing timber, but without success. Thereupon he proceeded himself to cut the trees into firewood, to convey it down the river and to find a market at Hartford. With the same independence and self-confidence, he soon afterward married Miss Abigail Wolcott, granddaughter of Governor Roger Wolcott, of East Windsor; and for their support, having

as yet no competence or law practice, he resorted to farming. He hired of his father a small improved farm in the neighborhood, and split the rails to enclose its fields. When court sat at Hartford he walked twice each day the intervening distance of ten miles.⁹

Probably this discipline was the thing needed to ripen the character already generously endowed. Although for several years the annual income from his profession did not exceed three pounds Connecticut money, he did not despair. Steady industry, faithful attention to detail, and superior education brought their usual reward—the respect of his neighbors and fellow lawyers, and an opportunity for distinction. Being entrusted, the story is, with a case of considerable importance, he conducted it with such conspicuous ability and success that it brought a rapid increase both in practice and in reputation.¹⁰ At the same time entering politics, he discovered from the start a temper and mind peculiarly adapted to the public emergencies. Events were rapidly approaching the Declaration of Independence, and Connecticut was not behind the other colonies in determination and energy. In managing her finances she was considerably in advance. As early as 1755, for the purpose of liquidating and adjusting accounts against the colony, the General Assembly had instituted a committee, known as the Committee

⁹ Flanders, *Lives and Times of the Chief Justices*, vol. II, 62.

¹⁰ Flanders, *Lives and Times of the Chief Justices*, vol. II, 63.

on the Pay Table.¹¹ As the expenditures of the colony increased, with the expedition to Crown Point and other undertakings, the labors of this committee were correspondingly augmented, until they embraced practically all payments made, and all supplies furnished, to Connecticut troops. Ellsworth—who from the fall of 1773 to the spring of 1775 was one of the two representatives of Windsor in the General Assembly—early became one of the four members of this committee; and some of his letters to Governor Trumbull¹² in connection with this work have been preserved. Though dry and terse in detail, they reveal an efficient, comprehensive grasp of the business. Incidentally to this office in 1776 he was sent to General Washington at Cambridge,¹³ and later to General Schuyler,¹⁴ to request repayment of moneys advanced to Connecticut troops in the Continental service. From 1778 he served at intervals for several years as a representative of Connecticut in the Continental Congress; and in 1779 he was chosen a member of the Connecticut Committee of Safety.

These public duties, though varied and exacting, were not continuous. They seem not seriously to have interrupted his legal practice. About the year 1775 he moved from the farm at Hartford,¹⁵ and for

¹¹ Colonial Records of Connecticut, vol. XIV, 431; Judicial and Civil History of Connecticut, p. 121.

¹² Trumbull Papers, Library of Massachusetts Historical Society.

¹³ Colonial Records of Connecticut, vol. XV, 235.

¹⁴ Colonial Records of Connecticut, vol. XV, 314-315.

¹⁵ Flanders, Lives and Times of the Chief Justices, vol. II, 63.

the ensuing ten years his reputation, and his income, at the bar steadily increased. Scarcely an important case was tried in which he was not engaged upon the one side or the other; and his docket would contain as many as a thousand cases a year. The office of state's attorney for Hartford County, to which he was chosen in 1777, may have contributed somewhat to his standing at the bar, though it could not have added much to his income. An act of 1730 had provided that there should be in each county, appointed by the county court, "one King's Attorney who should plead and manage in the county where he was appointed, in all matters proper, in behalf of our Sovereign Lord the King." This officer must have counted the dignity more than the fees as his compensation; for, toward the close of the eighteenth century, his fees were: For conducting and pleading each criminal case, not capital, before the Superior Court on bill found by the grand jury, nine dollars; for drawing an indictment on information, one dollar; for a trial before the Superior Court in a criminal case on information, or for conducting and pleading a civil case on behalf of the State, seven dollars; for prosecuting a civil case, when judgment is given on confession or default in the Superior Court, three dollars and thirty-four cents; and for a capital trial, fourteen dollars.¹⁶ It is not the least of his public services that, notwithstanding this meagre compensation, Ellsworth faithfully dis-

¹⁶ Judicial and Civil History of Connecticut, p. 157 *et seq.*

charged the exacting duties of this office for several years, in addition to his important legislative duties already described, and at the very time when his private practice was more and more requiring his attention. Indeed, in connection with the extraordinary litigation that arose out of and followed the Revolutionary War, he acquired a practice which in magnitude and remuneration had not up to that time been equalled by that of any other lawyer in the colony. This success was the more creditable because he did not possess the grace nor practice the arts of an orator. In speech he was simple, clear, earnest, and direct. With keen analysis and firm grasp of the facts he would penetrate at once to the main points, disregarding the lesser, and compel conviction by his sincerity and force. Frugal in habits and shrewd in money matters, he invested his savings so discreetly that he soon acquired a large fortune, with corresponding social position and influence. Noah Webster, the lexicographer, in 1779 a student in Ellsworth's office and a member of his family,¹⁷ spoke of his patron as one of the "three mighties"¹⁸ of the Connecticut bar—William Samuel Johnson and Titus Hosmer being the others.

The influence and reputation of these men show how rapidly the bar had advanced in public favor and respect during the Revolutionary period. At the same time had arisen a higher professional spirit.

¹⁷ H. E. Scudder, Noah Webster; Goodrich, Revised Webster's Dictionary, xv, xxii.

¹⁸ Memorial History of Hartford County, vol. I, 121.

In this movement for the improvement of the bar, Ellsworth was actively identified. He was one of the founders of the Bar Association of Hartford County. The original document, dated November 14, 1783, is extant, containing the regulations that henceforth should govern the signers in recommending "young gentlemen" for the bar; and among the thirty-two names are, besides his, several then or later distinguished in state and national affairs, like Chauncey Goodrich, Oliver Wolcott, Jr., Jesse Root, and Gideon Granger.¹⁹ The next year, 1784, Tapping Reeve began at Litchfield, Connecticut, the first school in New England for the thorough and systematic study of the law. So that before the close of the eighteenth century in Connecticut the rules governing admission to the bar required that the applicant should be of good moral character and at least twenty-one years old; should have three, or, if he had a college education, two, years study in the office of a practicing attorney; and finally should pass an examination by a committee of the bar.²⁰ The rules thus established remained practically unchanged for nearly a century.

The assistance thus rendered by Ellsworth in raising the standard for admission to the bar, he was soon able to supplement by even more important aid of a different kind and in a higher station. In 1784 he was made a judge of the Superior Court. The

¹⁹ Memorial History of Hartford County, vol. I, 123.

²⁰ Judicial and Civil History of Connecticut, p. 186.

same year this court received an enlargement of its powers. Independence having been achieved, the judicial system was reconstructed. A Supreme Court of Errors, consisting of the governor and the council was created; and the Superior Court was entrusted with exclusive equity jurisdiction in cases involving from 100 to 1600 pounds.²¹ This court was also the principal trial court. Created in 1711 in place of the Court of Assistants, it succeeded to many of the powers delegated in the 17th century to what was first known as the Particular Court, because it sat for the trial of particular causes, and later as the Quarter Court because it sat once every three months.²² When Ellsworth became a member it sat twice a year in each county, had jurisdiction throughout the state, and contained as his associates Richard Law, Elaphalet Dyer, Roger Sherman and William Pitkin. Thus constituted it was a court of great dignity and marked ability. Two of its members—Richard Law and Elaphalet Dyer—had been graduated at Yale. Two—Elaphalet Dyer and William Pitkin—had served in the expedition in 1758 against Canada, and had attained to the rank of colonel. All had been in the General Assembly, in the Governor's Council, and in the Continental Congress. Roger Sherman and Elaphalet Dyer had already been judges of this court for eighteen years;

²¹ Swift's Digest, p. 93. Judicial and Civil History of Connecticut, p. 125 *et seq.*

²² Swift's Digest, 93. Judicial and Civil History of Connecticut, p. 125 *et seq.*

and the year that Ellsworth was elected, Roger Sherman and Richard Law, under a special commission from the General Assembly, had recodified the statute law of Connecticut.

With this long and varied experience these men were singularly well fitted for the difficult task before them. This was to lay the foundations for a system of common law. In this work, the first requisite was that their decisions should be rendered in writing and be accurately reported. This was distinctly pioneer work in the development of the law. Hitherto no reports of legal decisions had been published in America. Even in England in the reports published prior to the American Revolution,—about 150 volumes—neither system nor accuracy prevailed or indeed was possible under the circumstances in which they were collected.²³ Notes by lawyers on cases, and memoranda by judges of their own decisions, made for private use and not for publication, subject to errors in hearing, inditing, condensing, and copying, but, after the author's death, preserved, purchased, or inherited, would finally be published. Not until the time of Lord Mansfield did the reports of English decisions become fairly accurate and trustworthy.

Likewise in Connecticut the patience of the bench, the bar, and the community had been long and sorely tried in depending, for the statement and preservation of the common law, upon the informal, unveri-

²³ Judicial and Civil History of Connecticut, p. 141 *et seq.*

fied, private notes of lawyers and judges. The situation and the need are well described by a contemporary:²⁴

Our Courts were still in a state of embarrassment. Sensible that the Common law of England, "though a highly improved system" was not fully applicable to our situation; but no provision being made to preserve and publish proper histories of their adjudications, every attempt of the judge to run the line of distinction between what was applicable and what was not, proved abortive. For the principles of the decisions were soon forgot or misunderstood or erroneously reported from memory. Hence arose a confusion in the determinations of our courts, the rules of property became uncertain, and litigation proportionately increased.

The first step toward a reform was taken in the Act of 1785, passed by the General Assembly, at the recommendation of the two judges of the Superior Court—Richard Law and Roger Sherman—whom it had appointed to codify the statute law. This law required the judges of the Superior Court to give their decisions in writing, when the pleadings closed with an issue at law, to be filed with the clerk as part of the record, in order that, as the act expressly said, the cases might be fully reported and "thereby a foundation laid for a more perfect and permanent system of common law in this state."²⁵

The next step soon became clear. "It became obvious . . . , that should histories of important causes be carefully taken and published, in

²⁴ Kirby's Reports, Preface.

²⁵ Statutes of Connecticut, Revision of 1784, p. 207. Judicial and Civil History of Connecticut, p. 142.

which the whole process should appear, showing the true grounds and principles of the decision, it would in time produce a permanent system of common law.”²⁶ Fortunately a reporter had long been in training. It was Ephraim Kirby, a native of Litchfield County, who had left Yale College to join the Continental troops, and after the war had studied law, and, at first supporting himself by manual labor, had gradually attained a respectable position at the bar.²⁷ As was then customary among lawyers he had early begun the collection of cases determined in the Superior Court. “I had entered on this practice,” he says, “in a partial manner for private use; which came to the knowledge of several gentlemen of distinction. I was urged to pursue it more extensively.”²⁸ It is easy to infer who some of these gentlemen were; for at the close of the preface of his book is the following certificate signed by the five judges of the Superior Court, including Ellsworth:²⁹

Having perused Mr. Kirby’s “Reports of Cases Adjudged in the Superior Court from the Year 1785 to May 1788” it appears to us that the cases are truly reported.

This book—one volume of about five hundred pages—was printed at Litchfield, Connecticut, in 1789; and it is the first volume of legal reports ever

²⁶ Kirby’s Reports. Preface.

²⁷ Judicial and Civil History of Connecticut, p. 143.

²⁸ Kirby’s Reports. Preface.

²⁹ Kirby’s Reports. Preface.

published in America. Today over two hundred official reports are issued annually.

Through the decisions thus preserved and reported a rapid development of the common law took place. From the time Ellsworth was appointed in 1784 until, resigning to enter the Constitutional Convention of 1787, he was succeeded by Jesse Root, his old friend and early patron, the membership of this court remained unchanged and a great variety of cases arose. In many of these, the court resorted to the English common law for the underlying principles, and the English reports were cited freely as authority. The limitations under which that law was applied were well stated in a decision rendered by Chief-Justice Law and Justice Ellsworth in 1786.³⁰

The common law of England we are to pay great deference to, as being a general system of improved reason, and a source from which our principles of jurisprudence have been mostly drawn. The rules, however, which have not been made our own by adoption, we are to examine and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances, the policy of our law, or simplicity of our practice.

Two applications of this rule will suffice. In 1787 a petition was filed for a writ of mandamus to compel Jedediah Strong,³¹ town clerk of Litchfield, to record a deed. It was a novel case. The objection was raised that the English rules of practice

³⁰ *Wooster vs. Parsons*, Kirby's Reports, 110, 117.

³¹ *Strong's Case*, Kirby's Reports, 345.

respecting the writ of mandamus had not been adopted in Connecticut either by positive law or by immemorial usage. In reply and in support of the petition, Tapping Reeve, who conducted the successful law school at Litchfield, and Uriah Tracy, two of the ablest members of the bar, argued that the power to issue the writ inhered in the court from necessity independent of statute and as part of the common law, citing various instances of its use from the English reports. The court ordered the writ to issue, applying, as to procedure, the English common law as modified by the statute 9 Anne.

Again, in a case decided in 1786,³² the court held that a wife could not devise lands to her husband, following the doctrine of the English common law respecting the disabilities of the *feme covert*. An abstract of the notes, made by Judge Ellsworth, in the consideration of this case and inserted with his permission toward the end of the volume, reveals his power of reasoning and his extensive knowledge of law. The subject is discussed successively from the standpoint of history, public policy, and expediency through the range of the civil law, the English common law, the law of nature and legislative enactments. Indeed throughout this volume, in the decisions to which Ellsworth's name is attached, runs the same firm, comprehensive grasp of legal principles and historical precedents, and the same independent, judicial temper; while his command of re-

³² Adams vs. Kellogg, Kirby's Reports, pp. 195, 438.

ported cases testify to thorough study and wide research.

This familiarity with English and American jurisprudence was the best possible preparation for framing a Constitution for the United States. If the liberties for which the people had fought were to be preserved, that instrument had to be devised, if at all, out of the forms and the elements of civil government already existing in the several states. After long and severe discipline in public disorder and distress the states were at last ready for a final effort to form a more perfect union. For this purpose they chose delegates to meet in Philadelphia in 1787. This service was admittedly so delicate and arduous that in the main only those men were chosen whom the momentous events and responsibilities that accompanied and followed the Revolution had tried and exalted. Hence the significance of the selection of Ellsworth, especially when the two men chosen as his associates were William Samuel Johnson and Roger Sherman. Allusion has already been made to the variety and importance of Sherman's public services; those of Dr. Johnson were nearly as great. Graduated at Yale in 1744, he had filled a succession of public offices, as member of the General Assembly, delegate to the Continental Congress, agent of Connecticut in England, and judge of the Superior Court. Withal he was a man of ripe scholarship, and had received the degree of Doctor of Civil Law from Oxford University. He had

wide experience at the bar and was distinguished for his eloquence. Both men were the senior of Ellsworth by about twenty years, and his selection as their associate in this service shows how fully he had already gained public confidence, though he was but forty-two years of age.

It was fortunate for Connecticut that she chose such strong men, for they were soon forced to employ all their learning and ability in her defence. Although in population she was among the smaller states, she had nevertheless, as Ellsworth pointed out in the convention, furnished more troops in the war for independence than had the great state of Virginia. She felt entitled, therefore, to an equal voice in continental affairs. Moreover, she believed this equality to be essential to her protection against the larger states, and in this she was joined and supported by the other small states.

This claim was supported by precedents. In the Continental Congress it had been acknowledged; and it was tacitly conceded in the organization of the convention. For in the rules³³ which the latter adopted at the outset to govern its deliberations, it was provided that all questions should be decided by a majority vote of the states that should be fully represented. Nevertheless, such a practice was inconsistent with the fundamental principle of republican government—the rule of the majority; and the larger states were determined not to incorporate it

³³ Madison Papers, vol. II, 724.

into the new general government. They insisted that suffrage in the national legislature should be proportional to population, that "the more perfect union" should be one of the individual citizens, and no longer of the several states. This struggle divided the Convention into two camps—the Nationalists, led by Madison and Wilson; and the Federalists, under Paterson, Lansing, and Luther Martin. It grew more insistent and threatening as the debate progressed, and finally overshadowing all other questions, led almost to despair.

Meanwhile the Connecticut men, while in the main siding with the Federalists, early perceived the need of concession and compromise. This was particularly true of Ellsworth. From the start, as if foreseeing the gathering storm, he prepared the way for compromise; for while Sherman zealously guarded the rights and privileges of the states, it would appear that Ellsworth, parting from him, voted for the election by the people of the lower house of the national legislature, and also for giving to the national legislature power in cases in which the states were not competent. As the debate grew more heated, he remained calm and conciliatory. Yielding to strong feeling, Randolph moved, and Paterson seconded that the Convention adjourn *sine die*. But Ellsworth declared that he did not despair, and that some good plan would be devised and adopted. To this end he steadily devoted his energies; and when after varying fortunes proportional representa-

tion was adopted for the lower house, he promptly and frankly expressed his approval, and at the same time moved that, in the Senate, the rule of suffrage be the same as that established by the Articles of Confederation.

Upon this motion occurred the decisive debate in this protracted and obstinate struggle, and in its support Ellsworth took the lead. According to Madison's report, he said: ³⁴

Over so great an extent of country . . . the only chance of supporting a general government lies in grafting it on those of the individual states; . . . we are partly national, partly federal. The proportional representation in the first branch was conformable to the national principle, and would secure the large states against the small. An equality of voices was conformable to the federal principle, and was necessary to secure the small states against the large.

He repeatedly answered the powerful arguments in turn of Wilson, Madison, and King, and with such success that the vote when taken was a tie, and the necessity of a compromise was generally admitted. To seek an agreement a committee was at once appointed in spite of the protest of Wilson and Madison, and Ellsworth was made a member. Though he was prevented by illness from sharing its labors, he heartily approved its report. It recommended that the states should have an equal vote in the Senate but that all money bills should originate in the House. The extreme Nationalists still held out, but

³⁴ Madison Papers, vol. II, 957, 958, 997, 998.

the Moderates, like Gerry and Strong, had been won over. Thus the great state of Massachusetts was divided, and the report was adopted by the majority of a single vote. Finally the acceptance of the result was made more easy by the further concession, suggested by Gerry, that in the Senate voting should be *per capita* and not by states.

The deadlock having been broken all other differences were adjusted with comparative ease. And in this work, Ellsworth—a master of details—took an active part. With Rutledge, Randolph, Gorham, and Wilson, he was on the important Committee of Detail that reported a constitution conformable to the resolutions of the convention. He failed, however, to sign this instrument, being detained from the convention through illness during its closing session. But when soon afterward the Constitution came before a convention in his own state for ratification, he was its chief supporter and expounder, delivering at least two speeches that have come down to us.³⁵ And when the Constitution had been ratified by the states, and officers were chosen to inaugurate the new government, Ellsworth and his former associate, Dr. William Samuel Johnson, were elected the first members from Connecticut in the Senate of the United States.

In the Senate, Ellsworth's work and influence were the natural result and sequence of his earlier promise and experience. Perhaps his most notable achieve-

³⁵ Carey's *American Museum*, vol. III, 334-343.

ment was the drafting and defence of the bill establishing the national judiciary. That he fully realized the importance of this work is clear from a letter he wrote to Richard Law, formerly his associate in the Superior Court, in August, 1789:³⁶

I consider a proper arrangement of the judiciary, however difficult to establish, among the best securities the government will have.

For this service, even among the many distinguished lawyers and jurists among his associates, he was especially fitted. Apart from his extensive practice at the bar, his honorable career on the Connecticut bench, and his conspicuous and efficient part in the Constitutional Convention, he was well aware of the urgent need and the proper form of a national judiciary from actual experience in the Continental Congress. In 1778 he had been sent by Connecticut to the Continental Congress, and had been placed upon the Committee on Appeals,³⁷ appointed at Washington's suggestion,³⁸ "to hear and determine upon appeals brought against sentences passed on libels in Courts of Admiralty in the respective states." The case of *Thomas Houston vs. The Sloop Active*³⁹ came before the committee on an appeal from a verdict of a jury in the Pennsylvania Court of Admiral-

³⁶ Wharton's State Trials, p. 38.

³⁷ Journal of Congress, October 26, 1778.

³⁸ Washington's Writings, Sparks Edition, pp. 154-5.

³⁹ United States vs. Peters, 5 Cranch's Reports, 115; 131 United States Reports, Appendix, xxix-xxxiv.

ty. The verdict was set aside. When, accordingly, the case was remanded to the state court, the latter refused to respect the decision of the committee, and ordered the marshal to sell the sloop in accordance with the verdict, and bring the proceeds into court. Against the execution of this order an injunction was granted by the Committee on Appeals, but this also was defied; and thus arose the first sharp conflict in jurisdiction between a state and the United States. The committee, much to their chagrin, found themselves powerless; and they merely entered on their records that they would take no further action "until the authority of the court be so settled as to give efficiency to their decrees and process."

To secure such efficiency had been the aim of the Constitutional Convention in adopting the article on the judiciary; but that article hardly more than outlined the jurisdiction of the United States courts. It was still necessary, by appropriate legislation, to determine their number, limits, and duties; and this task the Senate assumed early in its first session. It appointed a committee, making Ellsworth its chairman; and he drafted the bill which the committee submitted, and was its chief champion in the debate that followed. The discussion was worthy of the subject and the place. Among his associates were such able lawyers and jurists as William Paterson, later his associate in the Supreme Court of the United States; William Grayson, George Read, Rufus King, and Caleb Strong. These men brought

to bear searching criticism and extensive learning; but Ellsworth, in the words of William Maclay, an interested observer and opponent, would "batter down all his antagonist had said."⁴⁰ This vile bill is a child of his, and he defends it with the care of a parent, even with wrath and anger."⁴¹ To Maclay and his fellow state-rights men this bill was not only "vile" but it contained "the gunpowder plot of the Constitution,"⁴² because it made the United States courts supreme over the courts of the several states. But it was heartily approved by such eminent lawyers outside of Congress, to whom it was submitted, as James Wilson and the Attorney-General and the Chief-Justice of Pennsylvania.⁴³ It was finally adopted by both houses of Congress substantially as Ellsworth had written it. With some amendment it is still the charter of the United States courts.

While Ellsworth may fairly be called the "father of the national judiciary," still this was but one of his many services in the Senate. He had come to accept heartily the plan, embodied in the Constitution, of a national government, within its delegated powers and for its appropriate objects, supreme throughout the United States. He was no longer a partisan of the states. He had become a Nationalist. He favored such legislation by Congress as should ade-

⁴⁰ Maclay's Journal, p. 92.

⁴¹ Maclay's Journal, p. 91.

⁴² Maclay's Journal, p. 101.

⁴³ Maclay's Journal, p. 103.

quately realize the aims of the framers. He therefore vigorously supported Hamilton's financial policy as it was gradually revealed in the Funding Bill, the Assumption of the State Debts, and the National Bank. In his support of these measures he gradually displayed those qualities—tact, courage, initiative, conciliation, power, resource—that made him, one might say, indispensable in the inauguration and establishment of the republican system, outlined in the Constitution, during the presidency of Washington. In fact he became the administration leader in the Senate. About him gathered that compact, united, powerful group of Federalists, whom their opponents liked to call “the Court Party”—among others, Caleb Strong, George Cabot, Rufus King, Robert Morris and William Paterson, men of preëminent character and talent, whose meed of praise has been meagre indeed. Among them, Ellsworth was *facile princeps*. Such was the opinion of his contemporary, Fisher Ames, the then chief orator, writer, and political thinker of Federalism. When about to retire from the House of Representatives, in 1796, Ames wrote to Christopher Gore:⁴⁴

Ellsworth, Hamilton, King, and perhaps John Marshall, would lead well, especially Ellsworth,

. . . *quo non praestantior alter
aere ciere viros, Martemque accendere cantu.*

His want of a certain fire that H. and K. have, would make him the fitter as *dux gregis*.”

⁴⁴ Life and Works of Fisher Ames, vol. I, 203.

Perhaps the most severe test of this leadership occurred in connection with Washington's struggle for neutrality in the war begun by France against England in 1793. For the United States to allow herself to be involved in this war seemed to the Federalists, suicidal. It would seriously hazard, if it would not bring to naught, the momentous experiment which they were conducting, already with great difficulties, of putting into practice and confirming by experience the system of continental government outlined in the Constitution. This experiment was hardly more than begun. What little strength the national government had acquired by its initial successes was required for its own support, and must not be wasted in war. And yet the enforcement of this policy, obviously sound as it was, met two most serious obstacles: it contravened the nation's promises, and it lacked the sympathy of the people.

Under the Treaty of 1778 with France, the United States had received a recognition of their independence, with timely financial aid and military and naval reinforcements, and in return had guaranteed the French possessions in the West Indies, and had promised refuge to French cruisers in time of war. For the fulfillment of this alliance, not only in the letter but also in the spirit, the French government now appealed—and that to the people themselves. For this purpose an emissary named Genet was sent to the United States under the guise of a diplomatic agent. Landing at Charleston, he began at once

to fit out privateers to prey on British commerce, and to appeal directly to the people to take up the cause of France. This appeal received a hearty response. Everywhere Genet was accorded a popular ovation; and the country was swept by a tide of sympathy for France and of hatred for England. The latter was not without cause. Angered at her failure to collect her American debts, England had refused to deliver the western posts, and had preyed upon American commerce under orders in Council.

Nevertheless the Federalists were right; and much to their credit they presented a united front against the popular clamor. Washington regarded the treaty as abrogated, and proclaimed and enforced neutrality, checked the French propaganda, and arrested the French privateers. Concurrently in Congress his supporters steadily resisted all efforts either to aid France or to antagonize England. In the House it was a losing fight. Augmented by the popular support, the opposition in a strong majority were about to pass a bill imposing retaliatory restrictions and duties on English commerce. If this measure reached the Senate, so closely were the parties divided, it might be passed. And if it thus became a law, war with England would almost inevitably ensue.

In this peril, and as a last resort—after a conference between Ellsworth, Strong, Cabot, and King, and with their advice, voiced by Ellsworth—Washington took the extraordinary step of nominating a

special mission, with John Jay, the chief-justice, at its head, to attempt an adjustment with England. With the aid of these same men this nomination was at once confirmed by the Senate; and as a result the Jay Treaty was negotiated and war with England was averted. Again, when the Jay Treaty came up for ratification by the Senate, these men completed the work they had thus far conducted. By approving the Treaty, they made it possible for the Federalists in the House finally to overcome all resistance and obtain an appropriation for its execution.

Ellsworth's advocacy of the Jay Treaty was his last service in the Senate. In 1796 he was appointed chief-justice of the United States. John Jay, the first to hold this office, had resigned after negotiating the Jay Treaty, and John Rutledge had been named in his place. But the latter, after his nomination, antagonized Federal sentiment by a violent speech against the Jay Treaty, and was suddenly attacked by a disease that affected his mind. He was not confirmed by the Senate. Thereupon the office was offered to William Cushing, an associate-Justice and was declined. The associate next in length of commission was Wilson, but rumor favored Pater-son, another associate-justice. When, therefore, Ellsworth was selected there was great surprise, and to no one was it greater than to him.

By the public the nomination was received with satisfaction, and it was at once unanimously confirmed by the Senate. His fitness for the office must

have been obvious. His conspicuous success at the bar, his experience on the bench of his own state, his important services in the Constitutional Convention, and his work on the Judiciary Bill, made up an equipment both rare and apt. But the office was accepted by Ellsworth, as he wrote Governor Wolcott, with hesitation.⁴⁵ He may well have dreaded the effect on his health of the fatigue and exposure it involved. Under the Act of 1792 a judge could not be assigned the second time to the same circuit, without his consent, till that circuit had been held by all the other judges in succession. Thus the judges were kept travelling up and down the Atlantic seaboard, often with much hardship and long absences from home. It is said that Judge Cushing, with much independence and good sense, would travel, accompanied by his wife, in a phaeton drawn by two horses and driven by himself, tightly packed with books, groceries, and other comforts,—a colored servant following behind with the baggage in a one-horse vehicle.

Moreover, the office was not so exalted in the public estimation as it has since become. John Jay had resigned to accept the office of governor of New York, and Robert H. Harrison had declined an appointment as associate-justice to become chancellor of Maryland. Indeed the court had gained but slowly in public confidence, so sharply had some of its decisions antagonized public sentiment. One de-

⁴⁵ Gibbs, *Federal Administrations*, vol. I, 306.

cision,—*Chisholm vs. Georgia*⁴⁶—permitting one state to be sued by a citizen of another, aroused widespread alarm and a vigorous protest that ended only with the adoption of an amendment to the Constitution forbidding such a suit.

Nevertheless Washington had foreseen at the start the dignity and power latent in this court as conceived by the founders, and had selected its members with great care. In inaugurating it he had impressed upon each justice by a personal letter its unique opportunity and responsibility, and thus far the court had been in the main responsive to his appeal. Its members had been of a high average in character and ability. When Ellsworth became chief-justice the associates were, in seniority of appointment, William Cushing, of Massachusetts; James Wilson, of Pennsylvania; James Iredell, of North Carolina; William Paterson, of New Jersey; Samuel Chase, of Maryland. Cushing, selected by Washington as the first associate-justice and later as the successor of Jay as chief-justice, had been graduated at Harvard College and had studied law under Jeremiah Gridley, attorney-general of Massachusetts. In his own state, after a successful career at the bar, he had succeeded his father on the Superior bench, and on the reorganization of the judiciary in 1775 had become chief-justice of the Supreme Court. While in the latter office, in 1783, in a charge to a grand jury, he had ruled that slavery

⁴⁶ 2 Dallas's Reports, 419.

had been abolished in Massachusetts by the declaration in the Bill of Rights that all men are free and equal. Both Wilson and Paterson, after valuable service in Congress, had, as we have seen, taken leading parts in the Constitutional Convention, though on opposite sides. The former, while on the bench, became professor of law in the College of Philadelphia, later the University of Pennsylvania, and thus alternately expounded and elucidated the law, anticipating the similar dual service rendered to the profession by a later and no less distinguished member of this court, Joseph Story. Paterson had also shared with Ellsworth the struggle in the Senate for the success of the Federalist policy. Chase, too, had served in the Continental Congress, contributing materially by his force and ardor to the Declaration of Independence. Indeed his vehement, arbitrary temper was the chief defect in a mind otherwise powerful and profound. With a knowledge of law and a power of reasoning rarely found in judicial annals, his infirmity nevertheless later brought him to trial at the bar of the Senate and almost to impeachment.

In assuming the presidency of this able and distinguished group, Ellsworth took a modest view of himself, while he appreciated his responsibility. His judicial experience thus far had mainly embraced the affairs of a farming community. His new duties would involve also commercial and international law. He now followed the habit he had early formed, upon assuming a new duty, of diligent-

ly preparing to perform it. Though fifty-one years of age, he made an exhaustive examination of these subjects. At the same time he gave patient, thorough consideration to all cases brought before him. These in part grew out of recent or current events, and mainly concerned three general subjects,—the interpretation of the Constitution, the determination of the jurisdiction and practice of the court, and the interpretation and enforcement of treaties.

An instance of the first class was being argued the very day that Ellsworth was sworn into office. It was the case of *Hylton vs. the United States*,⁴⁷ one of the earliest to raise a question of constitutionality. In 1794 Congress had imposed duties on carriages used to convey persons, and this, it was argued in this case, was a direct tax, improperly laid and hence unconstitutional. But Alexander Hamilton, counsel for the other side, took the opposite view in one of his masterly arguments, and won the case. At the same session the court decided in the case of *Ware vs. Hylton*,⁴⁸ that an Act of the Virginia legislature passed during the Revolutionary War, confiscating debts due British subjects, was annulled by the Treaty of Peace. It was in this case that John Marshall appeared for the first time as counsel before this court, and delivered an argument so powerful and profound that it established his reputation as a leader at the bar.

⁴⁷ 3 Dallas's Reports, 171.

⁴⁸ 3 Dallas's Reports, 199.

Of the cases involving the jurisdiction of the court perhaps the greater number heard by Ellsworth were admiralty cases, some of them presenting intricate questions of international and prize law. In this field he brought into use the experience he had gained some twenty years before upon the Committee on Appeals in the Continental Congress; and he now had the satisfaction of confirming, and even extending, the jurisdiction which had then been denied. In the case of *Le Vengeance*,⁴⁹ decided soon after he took his seat, he extended somewhat the principle which his predecessor had affirmed in the case of *The Sloop Betsey*.⁵⁰ The latter case had established the jurisdiction of the Admiralty in cases of prizes and captures on the high seas. The former extended that jurisdiction to cases of seizure within a port—as far as the ebb and flow of the tide.

In another admiralty case Ellsworth was called upon to construe the Treaty of 1778 with France, which later, as special ambassador, he was the means of suspending. A French privateer capturing an English trader, *The Phœbe Ann*,⁵¹ came into the port of Charleston for repairs, bringing her prize. Such use of American ports was expressly stipulated in the Treaty. But the British consul claimed the prize, alleging that the privateer instead of being repaired had been illegally fitted out. As the evidence showed no material augmentation of her force,

⁴⁹ 3 Dallas's Reports, 297.

⁵⁰ Glass vs. Sloop Betsey, 3 Dallas's Reports, 6.

⁵¹ Moodie vs. Ship Phoebe Ann, 3 Dallas's Reports, 319.

the court denied the claim. In the Senate, as a leading Federalist, Ellsworth had been accused of prejudice against France, but his words now did not bear it out. "Suggestions of policy and convenience cannot be considered in the judicial determination of a question of right. The Treaty with France, whatever that is, must have its effect."

In the case of *Wiscart vs. Dauchy*,⁵² he construed the Judiciary Act which he himself had drawn. He ruled that the only method provided by that Act for removing a cause to the Supreme Court was writ of error, and that not the evidence but only the questions of law were thus removed. "The law may, indeed, be improper and inconvenient," he said, with his customary terseness and point, "but it is of more importance for a judicial determination to ascertain what the law is, than to speculate upon what it ought to be." The inconvenience of the rule thus determined was later obviated by the Act of Congress of March 3, 1803, substituting an appeal for a writ of error in equity and admiralty cases, and thus removing the evidence as well as the law to the higher court.

Perhaps his most celebrated, certainly his most criticized, decision was in the trial, at *nisi prius*, of Isaac Williams for enlisting on a French privateer in violation of the Treaty with Great Britain. Williams admitted the act, but claimed to be a French citizen, and offered in evidence French naturaliza-

⁵² 3 Dallas's Reports, 321.

tion papers, and the fact that he had resided in France since 1792, excepting only six months in 1796 when he had returned to the United States to visit relatives. Richard Law, formerly the associate of Ellsworth in the Superior Court, and now district judge of Connecticut, who sat with him in this case, was of the opinion that this evidence should be left to the consideration of the jury. But Ellsworth firmly and unhesitatingly held that it was irrelevant; that the English common-law doctrine of perpetual allegiance was part of the municipal law of the United States, and was based on the principle of the social compact. "All the members of a civil community," he declared in charging the jury, "are bound to each other by compact. The compact is that the community will protect its members, and they on the other hand will at all times be obedient to the laws of the community, and faithful in its defence. It necessarily follows that the members cannot dissolve this compact, without the consent or default of the community." Williams was found guilty, and was sentenced to be imprisoned four months and to pay a fine of one thousand dollars.

The principle thus laid down that a citizen cannot change his allegiance without his country's consent was opposed to popular sentiment and to national policy. It deeply aroused the anti-federalists and led to vigorous criticism in the press. The contrary doctrine—that a person may change his allegiance at will—is presupposed by our naturalization

laws, and has been asserted from the first by the State Department in dealing with foreign nations. Indeed, one of the chief causes of the War of 1812 was the fact that England, agreeing with Ellsworth, reclaimed and impressed into her service her natives whom we had received by adoption. And yet Ellsworth's decision was not directly overruled by the later judges, and was finally set aside only indirectly by inconsistent stipulations in the public treaties.

The trial of Isaac Williams took place at Hartford in September, 1799, and was one of the last cases heard by Ellsworth, as chief-justice. Already, in the February proceeding, he had been, much to his surprise and little to his liking, nominated by President Adams envoy extraordinary to France. The settlement with England by the Jay Treaty had aroused the violent animosity of France; and though several diplomatic efforts had already been made to placate her, they had served only to invite insult to our representatives, and injury and loss to our commerce. As a result retaliatory steps had been taken by the United States; the army and navy had been augmented to a war footing, and Washington had been recalled to the supreme command. Already armed conflicts had occurred on the high seas; and war, though not yet recognized, seemed at hand. Suddenly, to the surprise of all, and on his own initiative, President Adams reversed his policy, broke away from his party, and again resorted to negotia-

tion, having been privately assured that his advances would no longer be disdained. Following Washington's example, he selected the chief-justice for his principal peace-maker; and, as in the precedent, the new office was accepted and performed without the resignation of the old.

Though new to diplomacy, and embarrassed by his instructions, Ellsworth in this negotiation showed his usual courage and good sense. Unable to secure the much-desired indemnities, he boldly disregarded his instructions and made the best bargain he could, for the sake of peace. He secured the suspension of the treaties with France, and thus freed the United States from Europe. He stipulated that free ships should make free goods, and that a neutral flag should protect its cargo. Under these advantages, American ships rapidly gained in the carrying trade, and enjoyed unexampled prosperity.

When, however, this treaty was received in the United States, it was severely criticized, especially by Ellsworth's friends and political associates. Inferior in wisdom and foresight, they even imputed its deficiencies to a failing mind. He had, indeed, become ill, but not in mind. His health had gradually given way under the strain. He sent back a resignation of his office, and sought recuperation in England, for several months taking the waters at Bath.

Meanwhile he visited the courts at Westminster, and received the attention due his eminence and

reputation. He was invited to a seat beside Lord Kenyon in the King's Bench, and his simple, dignified demeanor made a deep impression.

In the spring of 1801 he returned to the United States, and retired to his home at Windsor, Connecticut. But his usefulness was not ended. Though he was still infirm in health, his mind was firm and active. He was almost at once chosen as one of the assistants of the Council in Connecticut, and *ex-officio* a member of the Supreme Court of Errors. This court consisted of the governor, lieutenant-governor, and twelve assistants. It sat alternately at Hartford and New Haven as a court of review over the adjudications of the Superior Court. Its decisions are reported in Day's Reports. As they do not often reveal the names of the judges by whom they are rendered, they add but little to our knowledge of Ellsworth as a judge; but in one case it is easy to discern his influence. In *Fitch vs. Brainard*,⁵³ it was held that a will of real estate by a *feme covert* was void. This followed a decision to the same effect in *Adams vs. Kellogg*,⁵⁴ rendered by him when he was a member of the Superior Court, which since then had been reversed by the Court of Errors.

Ellsworth continued on this court till in 1807, upon a reorganization of the judiciary, its duties were transferred to the Superior Court.⁵⁵ He was

⁵³ 2 Day's Reports, 163-194.

⁵⁴ Kirby's Reports, 195.

⁵⁵ Judicial and Civil History of Connecticut, 140.

then chosen to the new office of chief-justice of Connecticut. As was his habit when called to a new duty, he accepted. But he was seized soon afterward by a severe recurrence of his malady, and he died at Windsor, November 26, 1807.

Ellsworth possessed in a large measure the essentials of a great judge. He displayed great patience in attention. In this respect he was in strong contrast with his associate, Samuel Chase. The latter would rudely interrupt an argument, and even drive counsel to despair. Ellsworth was equally diligent in research. His opinions reveal a thorough, comprehensive knowledge of legal precedents and principles, in their full historic perspective. Indeed, his citations and references are remarkably copious and varied, considering his brevity. His terseness and point are characteristic. He cuts away all superfluous verbiage, avoids figures of speech, and seizing with firm, bold grasp the gist of the question, he states his conclusion in plain, clear, forcible words with no hesitating or uncertain tone. Far different in style was his associate, James Wilson. The latter, with that philosophic, scholastic cast of mind natural to a Scotchman, would roll out his opinion in flowing, sonorous sentences, embellished with all the ornaments and erudition of the classroom. In the matter of argument there was also a striking contrast; Associate-Justice James Iredell was noted for his close, logical reasoning, but Ellsworth would keep most of his mental processes to himself, and would express

barely more than his conclusions, though at times in argumentative outline.

If scant and even shy of words, he never failed in spirit. His courage and candor are refreshing, and convincing. Slow and laborious in thought, his conclusion when reached was decisive and never evasive. The subtle, diligent industry displayed by some judges in dodging an awkward question or in avoiding a precedent was foreign to him. His decision in the case of Isaac Williams was an example. Although in England the doctrine that a citizen could not change his allegiance without his country's consent had been deduced from the feudal relation of lord and vassal, Ellsworth boldly blazed his own path and planted the doctrine upon the basis of the social compact; and later judges, though hesitating to follow him, have never directly overruled him.

Indeed, such was his independence and impartiality that, although party spirit ran high and he was himself a thorough-going Federalist, his decisions are not noticeably colored by political prejudice. He took the law as he found it, indifferent whether it were the Treaty with France or the Alien and Sedition laws. And he strove earnestly to despatch business. Indeed, it was at *nisi prius* that his abilities showed to the best advantage. Fair and courteous, yet dignified, steady, and industrious, he transacted business with great satisfaction both to lawyers and to litigants; and he steadily gained in public estimation and respect. To this result

his appearance on the bench must have largely contributed. Tall and stately, with a strong, rugged face and massive head, his impressiveness was heightened by his judicial robe. And he presided with calm dignity and poise.

All in all he was perhaps the most efficient and best equipped judge this court had yet seen. In his brief tenure—less than four years, and much of that spent in tedious travel—he handled well the questions brought before him, such as they were. The great constitutional questions that developed and exalted Marshall had not yet arisen. Obviously he had no opportunity for great distinction on the bench.

Ellsworth's chief opportunity—and success—was in politics. Though an office-holder most of his life, "he was never known to seek office."⁵⁶ In public affairs in his own state, in the Constitutional Convention, and in the Senate he was preëminent. As John Adams said, he was "a master of business." Patient of detail, conciliatory in spirit, fertile in resource, ready and determined in debate, he was a dangerous antagonist and an adroit, efficient leader. And again Adams was right in calling him "the firmest pillar in Washington's administration in the Senate."⁵⁷

This great influence was due not more to his accurate and extensive knowledge and to his varied

⁵⁶ New York Evening Post, March 30, 1875.

⁵⁷ Adam's Works, vol. X, 108, 112.

and unusual ability, than to his remarkable character. His integrity was never questioned even in political strife; and his sincerity, fidelity, and earnestness pervaded all his thoughts and acts, and were firmly grounded in devout Christian conviction and practice.

These virtues shone especially in his home life. A lifelong resident of Windsor, he left a deep impression on its civic, educational, and religious life. A member of the church, he contributed liberally toward its support, and supervised the construction of its meeting house. He aided in the building of a causeway, an academy, and highways.⁵⁸ On the main street, about a mile from the old Palisade Green, he built a spacious, dignified mansion that still stands an ornament to the town. Here he raised a large family, one of his sons later becoming a member of Congress and governor of Connecticut. Here he entertained President Washington in 1789, and President John Adams in 1799. He was a typical New England gentleman, of whom his native town and state were justly proud. Alike in town, state, and nation, throughout his career, he cherished high ideals of citizenship and of republican government, and he strove to exemplify and realize them. Throughout his life he always followed himself the injunction he gave to the grand jury at Charleston in 1796: "Let us rear an empire sacred to the rights of men, and commend a government of reason to the

⁵⁸ Stiles's *Old Windsor*, vol. I, 379.

nations of the earth.”⁵⁹ Webster has well described him as one “who has left behind him, on the records of the government of his country, proofs of the clearest intelligence and of the deepest sagacity, as well as of the utmost purity and integrity of character.”⁶⁰

⁵⁹ Flanders, *Lives and Times of the Chief Justices*, vol. II, 190.

⁶⁰ Webster's *Works*, vol. III, 485.

ALEXANDER HAMILTON.

ALEXANDER HAMILTON.

1757-1804.

BY

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Our National Government — The Rock of our Political Salvation — Hamilton.¹

HAMILTON, the brilliant and dashing soldier, culminates in the storming of the redoubt at Yorktown, and his graceful and impetuous figure stands out for a brief moment in bold relief as the embodiment of chivalry and valor; Hamilton, the lawyer, is a tradition, although evidence is not lacking of his success as an advocate at the bar, but as a man of the law his fame must be known to the student or the select few; Hamilton the statesman, is alike the glory and the property of the Nation.

Any one of these qualities would entitle him to

¹ The following mosaic is composed of carefully selected passages from the lives by Senator Lodge in the American Statesmen Series (revised edition), Wm. G. Sumner, George Shea, and various others. In many cases passages are quoted and references given; at times the language is paraphrased, and in not a few instances when the reader was presumed to be off guard or when it otherwise seemed safe, neither quotation nor reference is given.

The primary source must always be that of the son John C. Hamil-

respect; their combination to admiration; but taken singly or collectively they fail to explain the fascination which his career inspires alike in young and old, and the affection in which he is held by successive generations of his countrymen.

The youth of Hamilton, his untimely and tragic death, appeal to the imagination and disarm criticism. The details of banking and finance are regarded merely as evidences of the genius and the mind of the man; the charm of manner and the dash of personal beauty make an appeal none the less direct and individual because of his failings. The age of Washington was heroic; Hamilton was human, a thing of flesh and blood. We instinctively feel this in contemplating the period and we turn our backs on the statue. The touch of nature makes us kin; we admire the life work of Hamilton but we love the man. Hamilton was always young with the weakness and strength of youth; a reliance upon his own judgment and a passionate obstinacy to control; but side by side there existed a passionate earnestness, boundless courage, irresistible energy and enthusiasm which crushed if it did not over-

ton, in seven volumes, but few references are given to it. Hamilton's services were great, but it lay not in the mouth of the son to proclaim them.

The Federal Edition of the works (2nd edition, 1904) by Senator Lodge is the one referred to.

Mr. Frederick Scott Oliver's *Alexander Hamilton: An Essay on American Union*, appeared too late for use in the text, but the work cannot be too highly commended.

Other references are cited in the notes.

come opposition. He had no past of his own; he settled in a country with none, and dreamed and planned of a future for himself and country. The task of youth is to do things, not to recount triumphs won; the future is the young man's heritage, and the future has claimed this stranger in the land as her very own.

And yet this man was never young. Physically he was indeed a child; mentally he was always a man. His life work was done at thirty-eight when he resigned from Washington's cabinet in 1795, but he had then been before the public for twenty years. He was mature rather than precocious, for the precocious youth is ordinarily the mediocre man. The younger Pitt was a marvelous prime minister at twenty-four; the Pitt of Austerlitz was a weak and worn out minister of the crown. Napoleon was a wreck at Waterloo. Hamilton grew with the years and death found him intellectually at his height.² Indeed Grotius and Hamilton in middle life stand almost alone among the wreck of youthful prodigies. The conclusion is inevitable; they were not youths; they were men—great alike at birth and death.

There is little to relate of the early years. Alexander Hamilton was born on January 11,

² He had not then attained his forty-eighth year. Chancellor Kent's *Memoirs of Alexander Hamilton*, printed in the appendix of *Memoirs and Letters of Chancellor Kent* by William Kent, pp. 328-329. This article is henceforth cited, "Memoirs." This admirable monograph seems to the present writer to be the profoundest study of the charac-

1757—the year of Romilly's birth—in the little Island of Nevis in the British West Indies. Genealogists have had a hard time with his ancestry and have had no little difficulty in patching up his parentage. The offspring himself was never strong in domestic relations.³ It is certain that his father was Scotch; that his mother was of French Huguenot descent. From the father he inherited the strength and appearance of his race; from the mother, the language, the charm and vivacity of the French. A quotation from a sympathetic biographer states this happy combination and transfusion: "A bright, ruddy complexion; light-colored hair; a mouth infinite in expression, its sweet smile being most observable and most spoken of; eyes lustrous with deep meaning and reflection, or glancing with quick canny pleasantry, and the whole countenance decidedly Scottish in form and expression. . . . His political enemies frankly spoke of his manner and conversation, and regretted its irresistible charm."⁴

What the education of the child was we do not

ter, ability, and honor of Hamilton and it is relied upon in the text and quoted in the notes. It was written in 1835 at the request of Mrs. Hamilton and is in the form of a letter to the widow of his distinguished and beloved friend.

³ See Lodge's *Life of Hamilton*, Appendix A, Note A, where the birth of Hamilton is treated with learning and sense and the reader in the nature of things, is left in doubt. The curious reader should consult Mrs. Gertrude Atherton, "*A few of Hamilton's Letters*" (1903), in the preface and appendix to which apparently conclusive evidence of Hamilton's illegitimacy is advanced.

⁴ George Shea: *Life and Epoch of Alexander Hamilton*, p. 45.

know: after the manner of the tropics he grew and blossomed early. At twelve years of age he was placed in a counting house and it is at his clerkly desk, as Mr. Lodge admirably puts it, that "we catch the first clear glimpse of the future statesman in the well-known letter addressed to his friend Edward Stevens: ⁵

I condemn the groveling condition of a clerk, or the like, to which my fortune condemns me, and would willingly risk my life, though not my character, to exalt my station. I am confident, Ned, that my youth excludes me from any hopes of immediate preferment, nor do I desire it; but I mean to prepare the way for futurity. I'm no philosopher, you see, and may justly be said to build castles in the air: my folly makes me ashamed, and I beg you'll conceal it; yet, Neddy, we have seen such schemes successful when the projector is constant. I shall conclude by saying, I wish there was a war.

Stilted and grandiloquent this undoubtedly is, but the young man of twelve had already fixed his eye on "futurity" and the desired war was the means of accomplishing his "constant ambition." As he lived and died in a whirlwind it is not unnatural that he was caught up by a hurricane. His account of one that ravaged the West Indies pleased his "vague relatives" and it was decided that the genius should be given a chance in the world.⁶ Funds were raised and the close of the year 1772 found Hamilton in

⁵ Works of Alexander Hamilton, vol. IX, 37-38.

⁶ A copy of this effusion was found in the Royal Library, Copenhagen, Denmark, and was republished for the first time in Mrs. Atherton's "A few of Hamilton's Letters," pp. 261-267.

New York, released from "the groveling condition of a clerk or the like to which my fortune, etc., condemns me."

An education was the first step to lead him from "the groveling condition" and he prepared himself for college earnestly and zealously as was his wont. His first choice was Princeton where he would narrowly have missed his future friend and rival, Madison. But Princeton promoted men by classes, and Hamilton wanted to rush through his course without waiting for the laggards to catch up. King's College possessed this advantage and the young man enrolled himself in King's College, now Columbia University, in the city of New York, where students could then, as now they cannot, pursue their studies as rapidly as individual capacity permits. The storm-cloud of revolution was gathering and the collegian was soon to be caught up in its progress. The war he desired was impending and the adventurer was at hand.

A successful speech in the fields, in 1774; a couple of vigorous pamphlets⁷ in 1774 and 1775, and the youth was a marked man, besought by whig and tory. The college was deserted; the pen was busy, but the sword was the means by which the young man was to carve his way to fame and fortune. Military affairs engrossed his study and he sought

⁷ Works of Alexander Hamilton, vol. I, 1-196, in which "A full Vindication" (1774); "The Farmer Refuted" (1775), and the "Remarks on the Quebec Bill" (1775), are given in full.

and found practical experience in a volunteer company. New England was already in arms and the war had begun.

There are two fine episodes of this period that cannot be passed over, for they show Hamilton's innate love of law and order, and a liberty broadly bottomed on both. In an attack upon Dr. Cooper, the loyalist president of Kings, Hamilton threw himself on the steps between president and mob, so that the good doctor escaped their violence, although confounding protector with mob, he denounced both. The reader will no doubt connect this little episode with Sergeant Hoche, thrusting himself between an angry and infuriated mob, so that his Queen might escape. The sympathy of both was with revolution; but a saving sense of chivalry offered protection to the weak and unfortunate.

In a similar way he saved the life of one Thurman from the rabble and when Rivington's press was destroyed and the types carried off by the mob, Hamilton besought his associates to pursue the Connecticut horse and recapture the property.

These are indeed small matters; but a chip shows the current of the flood, and these far from isolated instances show a sense of justice even in the throes of revolution.

The war had already broken out in New England and the colonies girded themselves for a struggle with the strongest power of Europe. Driven from

Boston, the British concentrated in New York, the possession of which they deemed essential. Could they have made New York a basis for successful operations, the loss of New York might have proved fatal to the colonies, because it would have shut off New England from the rebellious colonies in the south. There was then no west, and the Hudson would have been a waterway to Canada. Events showed the strategic value of New York, but it is futile to speculate what might have happened had the British commanders been capable and successful men. They were neither, and simply illustrate Burns's happy quatrain:

The best laid schemes o' mice and men
Gang aft a-gley;
And leave us naught but grief and pain
For promised joy.

In the struggle for the protection of New York, Hamilton won his spurs, so to speak. Early in 1776 the New York Convention ordered a company of artillery to be raised; Hamilton applied for the command and received it. The opportunity had come and Hamilton set his foot firmly upon the threshold of his dreams. He stood the baptism of fire at Long Island and covered the retreat; distinguished himself at White Plains and conducted himself admirably in the brilliant campaign of Trenton and Princeton. Greene had befriended the young man and introduced him to Washington. As cap-

tain he justified the encomium of the one and the approbation of the other. On March 1, 1777, Washington selected him as his military secretary with the rank of lieutenant-colonel. His connection with New York thus ceased when he entered the Continental Army. He lost for the time a state, but he gained a country. The sentiment of nationality, of loyalty to the nation rather than to the colony as such—which existed in the household of the Commander-in-chief—profoundly impressed the young man of twenty, who had not taken great interest in the colony as such. From being a Briton he became an American, without the intervention of a colony. The advocates of State-rights have been men reared in and devoted to a state; the foreigner looks solely to the nation and knows no lesser allegiance. Immigration made the North lovers of a union; the lack of immigration kept the South what it originally was, locally patriotic.

But to return to Hamilton. Many admirers find in him all the qualities of a great commander, and assign to him much of Washington's glory, in ascribing to the energetic and brilliant secretary, plans of the subsequent campaigns; his detractors, on the other hand, degrade him practically to "the groveling condition of a clerk, or the like," to which his fortune condemned him at the outset of his career. Neither view is correct, and the truth lies here, as often, in the golden mean. Hamilton's abilities first attracted Washington and these same abilities made

him exceedingly useful at headquarters. Confidence, a plant of slow growth, came later, and when Washington saw that the young man merited confidence, he freely bestowed it. In this way Washington found an excellent hand to execute the thought of his brain, and it may be true, indeed it is highly probable, that the young man exercised considerable influence on his chief. To exaggerate the importance of Hamilton in these years is simply silly. Washington stood alone from early youth and though he listened freely to advice he generally reserved his judgment. Hamilton was enthusiastic, overbearing, and rash; these qualities are lacking in Washington. Then again, competent and impartial critics consider that the New Jersey campaign was the most brilliant of Washington's military career, and this was outlined and executed before Hamilton was attached to his staff.⁸ The mind that thought out that campaign did not need tutelage. It would be equally unjust, however, to the young man to under-value his services; but whether at headquarters or in semi-diplomatic missions to Gates or Putnam, the services were essentially those of a subordinate. Hamilton chafed at this and regretted that he had left the line, and it would appear that

⁸ In speaking of the year 1781 the late Mr. Lecky said: "It is somewhat remarkable how very little was done at this time by Washington himself. His eminent wisdom in counsel and administration was never more apparent than in the latter period of the war; but his great military reputation appears to me to rest almost entirely on his earlier campaigns." *History of England in the XVIII Century*, vol. IV, 206.

he unsuccessfully applied for the position of adjutant-general, for which he was pressed by Lafayette, and his early protector, General Greene. It is absurd, however, to overlook the advantage of association and friendship with Washington. In the field, he would have been brilliant and dashing, no doubt. Brilliant and dashing he always was, but older and more experienced commanders were in the field. The solidity and judgment of Washington, seen at close range, must have been inestimable, and it would have been the part of wisdom in the younger man to fashion himself on the model of his chief; for, notwithstanding his enormous ability, the judgment of Hamilton was at times lamentably weak.

In the military career of Hamilton two picturesque moments may be singled out. In the aftermath of the miserable plot to betray West Point, in 1780, Hamilton played a rôle as delicate as it was admirable. His was the duty to console Mrs. Arnold in the first agony of her disgrace, and circumstances brought him into close personal contact with the unfortunate André. In two hurried and delicate, tender letters to the future Mrs. Hamilton (Miss Schuyler), he depicts the sufferings of the deserted wife, and, in a lengthy letter to Colonel John Laurens, he sympathetically described the agony of the unfortunate soldier who met a miserable fate with manly devotion and courage. Of André, he says and rightly: "Never did any man

suffer death with more justice or deserve it less. . . . Among the extraordinary circumstances that attended him in the midst of his enemies, he died universally esteemed and universally regretted." Hamilton's judgment is likewise the judgment of posterity: . . . "the refusing him the privilege of choosing the manner of his death, will be branded with too much obstinacy."⁹

He must be made of firm stuff and of no ordinary clay who can read these letters with an unmoistened eye.

The second episode is the storming of the redoubt at Yorktown. One day in the year 1781, on the 16th of February, Washington had sent for Hamilton to come to him; but the latter, to quote Mr. Lodge, "delaying a few minutes in obeying, found the General at the head of the stairs, who reproved him with no undue sharpness, saying that to keep him waiting was a mark of disrespect. Whereupon Hamilton replied: 'I am not conscious of it, sir; but since you have thought it, we part.' One can hardly read this youthful ebullition even now without a smile."¹⁰

⁹ Works of Alexander Hamilton, vol. IX, 206-223. Of the letter to Laurens, Mr. Lodge says: "This letter is the best description extant of Arnold's treason, and all the accompanying incidents. It is admirably written, and shows, in a striking way, Hamilton's literary skill."

¹⁰ The curious reader will find Hamilton's justification of his foolish conduct in a letter, dated February 18, 1781, addressed to his father-in-law, General Schuyler, in Works of Alexander Hamilton, vol. IX, 232-237.

It was reasonable that Washington should be annoyed, but a simple explanation, such as that given in the letter to General Schuyler, would have been eminently satisfactory. As it was, Washington sent for Colonel Hamilton, and a word should have reconciled the young man, but he childishly refused the proffered interview. Had Washington been less the man he was and a trifle more human, it is possible that Hamilton's military career would have ended then and there at the foot of the stairs. But Washington was incapable of resentment, and recognizing the services of his secretary and his youth, appointed him to command the assault upon the redoubt on October 14, 1781, which Hamilton executed with brilliancy and dash as was his wont. The war was practically over; his military career ended in a blaze of glory. Shortly thereafter Hamilton resigned his commission, and began the serious study of the law. The war had given him reputation; his marriage in the winter of 1780 with the daughter of General Philip Schuyler, added social position; the practice of law was to furnish a livelihood and be the stepping-stone to a broader career.

And for the practice of law Hamilton was admirably fitted. In the matter of physical presence he was as favored as Lord Erskine and he possessed a power of speech hardly inferior, it would seem, to the Scotchman. These are qualities not to be despised, but while they may make the verdict getter they do not make the lawyer. A knowledge of the

law and its fundamental and underlying principles; a knowledge of the history of the law added to the power of searching analysis and philosophic grasp are essential to the lawyer in the scientific sense. In rounded completeness they make the jurist. Mere learning in the law will not do; for the duty alike of lawyer and judge is not to decide past but to adjudicate present cases. The mere knowledge of precedents will decide a case clearly falling within the precedents; an understanding of the spirit or principle underlying the precedent can alone enable the bench and bar correctly to decide a case of first impression. A safe judge follows but does not go beyond the authorities; a great judge strips precedent from precedent until he discovers the spirit of the law, liberating it, as it were, from its confinement. In a word, he goes to the heart and soul of things. A couple of illustrations will serve to make clear this distinction in the person of two illustrious examples. Chief-Justice Marshall was wont to say: "These seem to me to be the conclusions to which we are conducted by the reason and the spirit of the law. Brother Story will furnish the authorities." It is a matter of history that Brother Story did furnish the authorities; it is also a fact that Story recognized the fundamental difference between himself and the great chief. "When I examine a question," said Story, "I go from headland to headland; from case to case. Marshall has a compass, puts to sea, and goes directly to his result."

These words are applicable to Hamilton, who went boldly and directly to the heart of things and laid bare the reason and spirit of any case, however difficult or complicated, with the unerring eye and hand of the master.

Hamilton's arguments at the bar are lost to us with a few exceptions, but his speech in the case of Harry Crosswell would of itself suffice for a reputation were other proofs lacking. We are not, however, forced to rely solely on this single speech and argument. Two measured opinions of friend and foe exist, upon which posterity may well be content to base its judgment.

First as to the political enemy. Judge Ambrose Spenser said:¹¹

Alexander Hamilton was the greatest man this country ever produced. I knew him well. I was in situations often to observe and study him. I saw him at the bar and at home. He argued cases before me while I sat as judge on the Bench. Webster has done the same. In power of reasoning, Hamilton was the equal of Webster; and more than this can be said of no man. In creative power Hamilton was infinitely Webster's superior. . . . It was he, more than any other man, who thought out the Constitution of the United States and the details of the Government of the Union; and, out of chaos that existed after the Revolution, raised a fabric every part of which is instinct with his thought. I can truly say that hundreds of politicians and statesmen of the day get both the web and woof of their thoughts from Hamilton's brains. He, more than any man, did the thinking of the time.

¹¹ Lodge's *Life of Alexander Hamilton*, pp. 273-274.

The opinion of the friend and admirer Kent, who followed Hamilton's career during a period of twenty-two years, could not be more overwhelming.¹²

He rose at once to the loftiest heights of professional eminence, by his profound penetration, his power of analysis, the comprehensive grasp and strength of his understanding, and the firmness, frankness, and integrity of his character. We may say of him, in reference to his associates, as was said of Papinian: "*Omnes longo post se intervallo reliquerit.*"

The fact that Hamilton appeared repeatedly before Kent's Court clothes his statements with peculiar authority. Kent's profound erudition and unswerving honesty, evidenced at once by his Commentaries and the whole course of his life, must make his judgment final.

The following passages are therefore quoted from Kent's Memoirs:

He never made any argument in court in any case without displaying his habits of thinking, and resorting at once to some well founded principle of law, and drawing his deductions logically from his premises. Law was always treated by him as a science founded on established principles.¹³

Between the years of 1795 and 1798 he took his station as the leading council at the Bar. He was employed in every important and especially in every commercial case.¹⁴

He taught us all how to probe deeply into the hidden recesses of the science, or to follow up principles to their far distant sources,

¹² Lodge's Life of Alexander Hamilton, p. 274.

¹³ Page 290.

¹⁴ Page 317.

He was not content with the modern reports, abridgments, or translations. He ransacked cases and precedents to their very foundations; and we learned from him to carry our inquiries into the commercial codes of the nations of the European continent, and in a special manner to illustrate the law of insurance by the severe judgment of Emerigon and the luminous commentaries of Valin.¹⁵

My judicial station, in 1798, brought him before me in a new relation, but the familiar friendly intercourse between us was not diminished, and it kept on increasing to the end of life. At circuits and in term time I was called, in a thousand instances, to attend with intense interest and high admiration to the rapid exercise of his reasoning powers, the sagacity with which he pursued his investigations, his piercing criticisms, his masterly analysis, and the energy and fervor of his appeals to the judgment and conscience of the tribunal which he addressed. If I were to select any two cases in which his varied powers were most strikingly displayed, it would be the case of *Le Guen vs. Gouverneur* and *Kemble*, argued before the Court of Errors in the winter of 1800, and the case of *Croswell ads. The People*, argued before the Supreme Court in February term, 1804.¹⁶

The other case I mentioned involved the discussion of legal principles of the greatest consequence. *Croswell* had been indicted and convicted of a libel upon Thomas Jefferson, then President of the United States. The libel consisted in charging Mr. Jefferson with having paid one Callender, a printer, for grossly slandering George Washington and John Adams, the former Presidents; and the defendant offered to prove the truth of the charge. But the testimony was overruled by Chief-Justice Lewis, who held the circuit, and he charged the jury that it was not their province to decide on the intent of the defendant, or whether the libel was

¹⁵ Page 318. He was not content, for instance, with examining Grotius and taking him as an authority in any other than in the original Latin language in which the work was composed. Page 317.

¹⁶ Pages 320-321.

true or false or malicious, and that those questions belonged exclusively to the court. The motion was for a new trial for misdirection of the Judge and those two great points in the case were elaborately discussed before the Supreme Court, and they were considered by General Hamilton, who appeared gratuitously for the defendant, as affecting very essentially the constitutional right of trial by jury in criminal cases, and the American doctrine of the liberty of the press.

I have always considered General Hamilton's argument in that cause the greatest forensic effort that he ever made. He had bestowed unusual attention to the case, and he came prepared to discuss the points of law with a perfect mastery of the subject. He believed that the rights and liberties of the people were essentially concerned in the vindication and establishment of those rights of the jury and of the press for which he contended. That consideration was sufficient to arouse all the faculties of his mind to their utmost energy. He held it to be an essential ingredient in the trial by jury that, in criminal cases, the law and the fact, were necessarily blended by the plea of not guilty, and that the jury had a rightful cognizance of the intent and tendency of the libel, for in the intent consisted the crime. They had a right and they were bound in duty to take into consideration the whole matter of the charge, both as to the law and the fact, for it was all involved in the issue and determined by a general verdict. On the independent exercise of the right of the jury in criminal cases to determine the guilt or innocence of the defendant, according to their judgment and consciences, rested the security of our lives and liberties. Nothing would be more dangerous to the citizens of this country than to place the trial by jury in such cases under the control and dictation of the court. The English history, in its dark and disastrous periods, showed abundantly by its records that the most dangerous, the most sure, the most fatal of tyrannies consisted in selecting and sacrificing single individuals, under the mask and forms of law, by dependent and partial tribunals. We could not too perseveringly cultivate and sustain the rights of the jury

in all their common-law vigor, as the great guardians of liberty and life, equally against the sport and fury of contending factions, the vindictive persecution of the public prosecutor, and the 'machinations of demagogues and tyrants on their imagined thrones.'

On the other great question in the case he contended with equal ardor and ability for the admission of the truth in evidence to a qualified extent in justification of the libel. He showed that it depended on the motive and object of the publication whether the truth was or was not a justification.

The liberty of the press was held to consist in the right to publish with impunity the truth, whether it respected government, magistrates, or individuals, provided it was published with good motives and for justifiable ends. The hard doctrines under which his client was convicted came from the Star Chamber, that arbitrary and hated tribunal acting under the government of a permanent body of judges, without the wholesome restraints of a jury. He felt a proud satisfaction in the reflection that the Act of Congress of July, 1798, for preventing certain libels against the Government, and which Act had been grossly misrepresented, established these two great principles of civil liberty involved in the discussion. It declared that the jury should have the right to determine the law and the fact, under the direction of the court, as in other cases, and that the defendant might give in evidence in his defence the truth of the libel. He was as strenuous for the qualification of the rule allowing the truth of the libel to be shown in the defence, as he was for the rule itself.

While he regarded the liberty of the press as essential to the preservation of free government, he considered that a press wholly unchecked, with a right to publish anything at pleasure, regardless of truth or decency, would be, in the hands of unprincipled men, a terrible engine of mischief, and would be liable to be diverted to the most seditious and wicked purposes, and for the gratification of private malice or revenge. Such a free press would destroy public and private confidence, and would overawe and corrupt the impartial administration of justice.

There was an unusual solemnity and earnestness on the part of General Hamilton in this discussion. He was at times highly impassioned and pathetic. His whole soul was enlisted in the cause, and in contending for the rights of the jury and a free press he considered that he was establishing the finest refuge against oppression. The aspect of the times was portentous, and he was persuaded that if he should be able to overthrow the high-toned doctrine contained in the charge of the judge, it would be great gain to the liberties of his country. He entered, by the force of sympathy, into the glorious struggles of English patriots, during oppressive and unconstitutional times, for the rights of juries and for a free press; and the anxiety and tenderness of his feelings and the gravity of his theme rendered his reflections exceedingly impressive. He never, before, in my hearing, made any effort in which he commanded higher reverence for his principles, or equal admiration of his eloquence.

Nor were his efforts on that occasion lost to his country. The fruit of them still exists and will remain with posterity, a monument of his glory, though the court was equally divided on the motion he discussed, and therefore decided nothing; yet in the following winter the Legislature of New York passed a declaratory statute, introduced into the House of Assembly by William W. Van Ness, his friend and associate on the trial, admitting the right of the jury in all criminal cases to determine the law and the fact under the direction of the court, and allowing the truth to be given in evidence by the defendant, in every prosecution for a libel; provided that such evidence should not be a justification, unless it should be made satisfactorily to appear that the matter charged as libel was published with good motives and for justifiable ends.¹⁷

The address is to be found in Lodge's Edition of the Works of Alexander Hamilton,¹⁸ and notwithstanding the close logic and analysis of the pre-

¹⁷ Pages 323-326.

¹⁸ Vol. VIII, 387-425.

cedents and the absence of ornament or literary effect, it compares not unfavorably with Erskine's famous speech in behalf of the Dean of St. Asaph on the Rights of Juries. Its compressed thought carries conviction, but as reported and printed, while it amply justifies Hamilton's reputation as a lawyer, it gives no adequate idea of his power as an orator. It has, for example, none of the richness of thought and literary splendor that characterize the contemporary address of Sir James Mackintosh in defence of Peltier. The fault, however, is the fault of the publisher, not of Hamilton, for, as the reporter said:

It is proper, however, to remark, that the brief sketch of the arguments of counsel is not given with a view to exhibit, in any degree, the solid and ingenious reasoning, or the powerful and matchless eloquence, displayed in this interesting and celebrated cause, but merely to present to the profession the general course of argument, and the legal authorities adduced on a very important and much litigated subject of jurisprudence.

The *People vs. Croswell* (1804) is reported in the 3d volume of Johnson's Cases.¹⁹ In speaking of the case, which is printed in the Appendix to the Reports, Mr. Johnson says:

The nature and magnitude of the questions discussed in the following case, which came before the supreme court subsequent to the time of these reports, will, it is believed, render my apology unnecessary for its insertion, as an appendix to this volume. It was obligingly communicated to the reporter, by a person of great

¹⁹ Page 337.

legal eminence [Kent] on whose accuracy and judgment the utmost reliance is placed.

The case has always been considered the strongest and most forcible presentation of the theory that truth may be given in evidence on indictment for libel and that the jury is to decide both on the law and the fact. The opinion of Kent himself was worthy of the argument of his friend, General Hamilton.²⁰ As stated in the quotation from Kent, the judges were equally divided but a bill was introduced in and passed both Houses unanimously, and became a law on the 6th of April, 1805, which act brought the law into harmony with Hamilton's argument. The statute recognized Hamilton's contention and it is especially stated to be declaratory of the law. In consequence of this statute the court in the August term, 1805, unanimously awarded a new trial.

The following quotations from books of authority show the influence of Hamilton's argument and the present status of the law:

A general and comprehensive definition of libel is that of Lord Camden, cited by Hamilton in the argument in the case of *The People vs. Croswell*, which has been repeatedly approved by the courts of New York, and is as follows: "A censorious or ridiculing writing, picture, or sign, made with a mischievous or malicious intent, toward government, magistrates or individuals."²¹

²⁰ An accurate but brief summary of the argument in the very words of Hamilton is given on page 360 to 362 (3 Johnson's Cases) in which Hamilton recapitulated the substance of the doctrine for which he contended. The argument, including the summary, is likewise printed in *Works*, vol. VIII, 383-386.

²¹ May's *Criminal Law*, 3rd edition, sec. 172, p. 153.

To constitute a malicious publication it is not necessary that the party publishing be actuated by a feeling of personal hatred or ill-will towards the person defamed, or even that it be done in the pursuit of any general evil purpose or design, as in the case of malicious mischief. It is sufficient if the act be done wilfully, unlawfully, and in violation of the just rights of another, according to what, as we have seen, is the general definition of legal malice. And malice is presumed as matter of law by the proof of publication. Under modern statutes, and, in some cases, constitutional provisions, however, the whole question of law and fact, *i. e.*, whether the matter published was illegal and libellous, and whether it was malicious or not, as well as whether it was written or published by the defendant, is left to the jury, they having in such cases greater rights than in other criminal prosecutions.

It is not essential that the charge should be false or scandalous; it is enough if it be malicious. Indeed, the old maxim of the common law was, "The greater the truth, the greater the libel," on the ground that thereby the danger of disturbance of the public peace was greater. The truth, therefore, is no justification of the common law. But this rule has in some cases, in this country, been so far modified as to permit the defendant to show, if he can, that the publication under the circumstances was justifiable and from good motives, and then show its truth, in order to negative the malice and intent to defame. And statutes in most if not all of the States now admit the truth in defence if the matter be published for a justifiable end and with good motives, and give the jury the right to determine these facts, as well as whether the publication be a libel or not."²²

At common law, the fact that the publication is true is no justification, but by statutes in England and in this country, the common-law rule has been so far modified that the truth of the publication may be shown, and will constitute a defense,

²² May's Criminal Law, 3rd edition, sec. 173, pp. 156-157.

if it is made to appear that the publication was made with good motives, and for justifiable ends, or that it was for the public benefit. Unless this is made to appear, the truth of the publication is no justification or excuse, even under the statutes.²³

The whole subject is discussed with accuracy and a profusion of learning in *Sparf and Hanson vs. United States*.²⁴ Attention is particularly called to the dissenting opinion of Mr. Justice Gray—according as it does with Hamilton's—in which the present writer most respectfully concurs. The following paragraphs are quoted from this masterly opinion:²⁵

The question of the right of the jury to decide the law in criminal cases has been the subject of earnest and repeated controversy in England and America, and eminent jurists have differed in their conclusions upon the question. In this country, the opposing views have been fully and strongly set forth by Chancellor Kent in favor of the right of the jury, and by Chief-Justice Lewis against it, in *People vs. Croswell* (3 Johnson's Cases 337); by Judge Hall in favor of the right, and by Judge Bennett against it, in *State vs. Croteau* (23 Vermont Reports, 14); and by Chief-Justice Shaw against the right, and by Mr. Justice Thomas in its favor, in *Commonwealth vs. Anthes* (5 Gray's Reports, 185.)

Alexander Hamilton was of counsel for the defendant. Two reports of his argument upon that motion have come down to us, the one in 3 Johnson's Cases (pp. 352-362), the other in a contemporary pamphlet of the speeches in the case (pp. 62-78),

²³ Clark and Marshall's *Criminal Law*, 2nd edition, 649. See also: McClain on *Criminal Law*, vol. II, secs. 1051 and 1054.

²⁴ 156 *United States Reports*, pp. 51-183.

²⁵ The passages of the brief referred to are printed in Lodge's edition of *Works of Alexander Hamilton*, vol. VIII, 385-386.

and reprinted in 7 Hamilton's Works (ed. 1886, 336-373). But the most compact and trustworthy statement of his position upon the general question, *unsurpassed for precision and force by anything on the subject to be found elsewhere*, is in three propositions upon his brief, (7 Hamilton's Works, 335, 336) read by him in recapitulating his argument, (3 Johnson's Cases, 361, 362).

Hamilton's disinterestedness is shown by the fact that he appeared gratuitously as did Richard Henry Dana, Jr., in the case of Anthony Burns, and Dana's noble reply in returning a check to the anti-slavery advocates was doubtless uppermost in Hamilton's mind: "Besides my own feeling in the matter, which would be conclusive with me, I would not have the force of precedent which has been set in the trials for *freedom* in Massachusetts thus far impaired in the least, for the honor of my profession and the welfare of those in peril."

The case of *People vs. Croswell* has been considered at length because it is the one case in which Hamilton's brief and argument exist in a form sufficiently authentic, and they are both—through Johnson's Reports and Mr. Lodge's admirable edition of the Works—readily accessible to lawyer as well as layman. There are happily still other and ampler materials extant by which Hamilton's power of legal analysis may be tested: The *Federalist*, and the Opinion as to the Constitutionality of the Bank of the United States, 1791. The latter is professedly the exercise of a trained lawyer and is a reply to the

adverse opinions of the Secretary of State (Jefferson) and the Attorney-General (Randolph) of Washington's cabinet. It is a matter of common knowledge that Washington accepted the opinion of his Secretary of the Treasury, and it also is a matter of knowledge that Chief-Justice Marshall's masterly judgment in *McCulloch vs. Maryland*²⁶ is based upon the Hamiltonian theory as to the implied powers of the Constitution. In fact, at the close of the argument, the great Chief-Justice remarked that "there was nothing in the whole field of argument that had not been brought forward by Hamilton." To have convinced Washington and to be affirmed by Marshall in a unanimous court is in itself a demonstration. But of the *Federalist* and *Opinion* in turn and in detail.

It is well known that the Constitution as it left the Convention of 1787 was not wholly to Hamilton's liking. The inefficiency of the Confederacy, not to say its helplessness, was due to the lack of a central coercive force, and he looked to such a thorough revision or remodelling of the discredited articles as would obviate this defect by conferring upon the government of the country every power necessary to the preservation of national existence. He looked to a welding or fusion of the states into a nation, rather than a co-ordination of equal states. His union was not merely to be more perfect: it was to be indissoluble—indissoluble because the parts in be-

²⁶ 4 Wheaton's Reports, p. 316 (1819).

ing merged into the whole had lost their original characteristics. His plan failed of adoption, and the result was, as is well known, a compromise more or less happy between the national and local elements. The preamble voiced this national sentiment; the decisions of Chief-Justice Marshall interpreted the Constitution in this national sense; and the war between the states made us a nation. In the throbbing words of Chief-Justice Chase, in *Texas vs. White*: "The Constitution in all its provisions looks to an indestructible Union composed of indestructible States."²⁷

But the Constitution, however inadequately it met Hamilton's views, received his immediate and unswerving support. If the union was not perfect, it was nevertheless more perfect than the union under the Articles of Confederation. Its adoption was therefore a first necessity.

In the New York convention he was its pillar of strength and his eloquence overcame, if it did not silence, opposition. But the influence of a voice dies with the sound. The people must be reached, roused, and rallied. Therefore Hamilton and his two bosom friends, James Madison and John Jay, united in the serial publication in the press of a systematic exposition of the Constitution in order to show the exact nature and extent of the federal government contemplated by the Constitution. The essays extended over many weeks and appeared as a

²⁷ 7 Wallace's Reports, pp. 700, 725 (1868).

rule every three days. The conception was Hamilton's; the execution was largely his and it is not unjustly regarded as his monument.²⁸ The press teemed with attack and defense, but their very names are lost to all save the antiquary, while these fugitive sheets have stood the test of time and are alone remembered. The nature of their publication precluded reflection and study, for Hamilton and Madison were busy men in the thick of a contest. The work was the overflow of a well-stocked mind, which responded to any emergency. These papers are not light reading, for they are the anatomy of government, into which Hamilton was later to breathe the breath of life and make the blood pulsate to the very extremes of the body. They are expository and analytical in their nature; for Hamilton needed to analyze the national and state power, showing where each would fall and the appropriate sphere of each under the Constitution. But more than analysis was necessary, for the system as a whole must be considered and brought to the comprehension of the citizen. Not only was it an analysis and an exposition; it was a prophecy, for the Constitution was not meant for a day, but it may be for all time. It was therefore necessary to show the origin of each provision; to analyze and expound the provision as a

²⁸ For an investigation of the perplexing question of authorship of the various numbers see Lodge's introduction to the *Federalist* in *Works*, vol. XI, 15-65; and also the introduction of the late Paul Leicester Ford to his admirable one volume edition of the *Federalist*.

part of the whole; to outline and interpret the Constitution in the light of the future. It therefore demanded and well-nigh exhausted the highest powers of reason and analysis, exposition, and interpretation. It was the work of philosopher, statesman, lawyer, and judge, all four happily and profoundly united in the person of Hamilton, in whose life the *Federalist* was an incident, composed in odd moments, often written while the printer waited for the copy, snatched rather than spared from the thousand and one avocations of a party leader.

To have produced a rounded whole would have been to his infinite credit; to have produced the world's masterpiece in the matter of constitutional government argues a miracle.

The American is, however, not to be trusted in this matter of the *Federalist*; for the Constitution is dear to him in every fibre of his body and the prejudice in favor of the source of political happiness and prosperity extends to the *Federalist*. The foreigner is a saner and therefore a safer guide; but cool reflection and disinterested contemplation are no less commendatory, and time and place add to rather than detract from the merits of the *Federalist*. Sir Henry Maine, the author of the work on *Ancient Law* and one of the foremost writers on the development of legal institutions, was no lover of America and his study on *Popular Government* is anything but a panegyric upon our institutions, yet the conclusion of this profound investigator as to the *Federalist* is

strangely like that of the American, although the language is more balanced and measured.²⁹

The antecedent doubt, whether government by the Many was really possible — whether in any intelligible sense, and upon any theory of volition, a multitude of men could be said to have a common will — would have seemed to be strengthened by the facts that whenever government by the Many had been tried, it had ultimately produced monstrous and morbid forms of government by the One, or of government by the Few. This conclusion would, in truth, have been inevitable, but for the history of the United States, so far as they have had a history. The Federal Constitution has survived the mockery of itself in France and in Spanish America. Its success has been so great and striking, that men have almost forgotten that, if the whole of the known experiments of mankind in government be looked at together, there has been no form of government so unsuccessful as the Republican.

The antecedents of a body of institutions like this, and its mode of growth, manifestly deserve attentive study; and fortunately the materials for the inquiry are full and good. The papers called the "Federalist," which were published in 1787 and 1788 by Hamilton, Madison, and Jay, but which were chiefly from the pen of Hamilton, were originally written to explain the new Constitution of the United States, then awaiting ratification, and to dispel misconstructions of it which had got abroad. They are thus, undoubtedly, an *ex post facto* defence of the new institutions, but they show us with much clearness either the route by which the strongest minds among the American statesmen of that period had travelled to the conclusions embodied in the Constitution, or the arguments by which they had become reconciled to them. The "Federalist" has generally excited something like enthusiasm in those who have studied it, and among these there have been some, not at all given to ex-

²⁹ Maine's Popular Government, pp. 201-205.

cessive eulogy. Talleyrand strongly recommended it; and Guizot said of it that, in the application of the elementary principles of government to practical administration, it was the gréatest work known to him. An early number of the "Edinburgh Review" (No. 24) describes it as a "work little known in Europe, but which exhibits a profundity of research and an acuteness of understanding, which would have done honor to the most illustrious statesmen of modern times." The American commendations of the "Federalist" are naturally even less qualified. "I know not," wrote Chancellor Kent, "of any work on the principles of free government that is to be compared in instruction and in intrinsic value to this small and unpretending volume of the 'Federalist'; not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke. It is equally admirable in the depth of its wisdom, the comprehensiveness of its views, the sagacity of its reflections, and the freshness, patriotism, candour, simplicity, and eloquence, with which its truths are uttered and recommended." Those who have attentively read these papers will not think such praise pitched, on the whole, too high. Perhaps the part of it least thoroughly deserved is that given to their supposed profundity of research. There are few traces in the "Federalist" of familiarity with previous speculations on politics, except those of Montesquieu in the "*Esprit des Lois*," the popular book of that day. The writers attach the greatest importance to all Montesquieu's opinions. They are much discomposed by his assertion that Republican government is necessarily associated with a small territory, and they are again comforted by his admission, that this difficulty might be overcome by a confederate Republic. Madison indeed had the acuteness to see, that Montesquieu's doctrine is as often polemical as philosophical, and that it is constantly founded on a tacit contrast between the institutions of his own country, which he disliked, with those of England, which he admired. But still his analysis, as we shall hereafter point out, had much influence upon the founders and defenders of the American Constitution. On the

whole, Guizot's criticism of the "Federalist" is the most judicious. It is an invaluable work on the application of the elementary principles of government to practical administration. Nothing can be more sagacious than its anticipation of the way in which the new institutions would actually work, or more conclusive than its exposure of the fallacies which underlay the popular objections to some of them.

To take up the opinion upon the constitutionality of the bank in which the powers of close, rapid, and conclusive reasoning, which Hamilton possessed in abundance, were put to test. He was very busy at the time, as appears from his letter to President Washington. To prepare his opinion he was obliged to sit up most of the night, as he says. As it is hurried and hasty as regards preparation, the native quality of his mind is therefore more evident than if the opinion had been the work of many weeks.

President Washington was in doubt as to the constitutionality of the bank, and he, therefore, requested, or, to use his own term, required the various members of his cabinet to present their views in writing. The importance of this transaction lies not merely in the fact that Hamilton shone to greater advantage than Randolph and Jefferson; but in the fact that Hamilton in this argument laid bare, expounded, and, by the grace of Chief-Justice Marshall and a unanimous court, in *McCulloch vs. Maryland*, established the implied powers of the Constitution upon an equality with those expressly granted.

Hamilton, it will be remembered, stood for a na-

tional government, and objected to the Constitution because that instrument did not centralize the power in a national government. He wished to make this government effective by clothing it, not merely with the express powers, but with all the powers necessary or incidental to the exercise of powers with which a sovereign is ordinarily vested. His opinion was a masterpiece. It not only convinced Washington; it impressed Marshall, and it is the recognized canon of constitutional interpretation. The opinions of Messrs. Jefferson and Randolph were transmitted to Hamilton, and his opinion falls into two divisions, in the first of which he considers, in general, the doctrine of implied and express powers; and in the second part specifically answers the various and technical objections of Jefferson and Randolph.

In order that the answer of Hamilton may be properly appreciated, the salient objections contained in Jefferson's opinion are given:

I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." Xth amendment. To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States, by the Constitution.

1. They are not among the powers specially enumerated: for

these are: 1st, A power to lay taxes for the purpose of paying the debts of the United States. . . .

2. "To borrow money." . . .

3. To "regulate commerce with foreign nations, and among the States, and with the Indian tribes." . . .

II. Nor are they within either of the general phrases, which are the following:

1. To lay taxes to provide for the general welfare of the United States, that is to say, "to lay taxes for *the purpose* of providing for the general welfare." For the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.

It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they please.

It is an established rule of construction where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposed as a means was rejected as an end by the Convention which formed the Constitution. A proposition was made to them to authorize Con-

gress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.

2. The second general phrase is, "to make all laws *necessary* and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank therefore is not *necessary*, and consequently not authorized by this phrase.

It has been urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true: yet the Constitution allows only the means which are "*necessary*", not those which are merely "*convenient*" for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory.

Anyone familiar with Hamilton's compressed style will at once recognize how difficult it is to paraphrase a series of syllogisms, or to give a summary of his legal argument. It is, therefore, proposed to lay before the reader the necessary parts of Hamilton's opinion in order that he may judge for himself of the legal quality of Hamilton's mind, rather than accept the opinion of another, however well qualified that other may be. The opinion of

Hamilton is given in his own language. The abridgment consists in the omission of passages valuable but not necessary to an understanding of the question at issue.

In entering upon the argument, it ought to be premised that the objections of the Secretary of State and Attorney General are founded on a general denial of the authority of the United States to erect corporations. The latter, indeed, expressly admits, that if there be anything in the bill which is not warranted by the Constitution, it is the clause of incorporation.

Now it appears to the Secretary of the Treasury that this *general principle is inherent* in the very *definition* of government, and *essential* to every step of progress to be made by that of the United States, namely: That every power vested in a government is in its nature *sovereign*, and includes, by *force* of the *term*, a right to employ all the means requisite and fairly applicable to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the *essential ends* of political society.

This principle, in its application to government in general, would be admitted as an axiom; and it will be incumbent upon those who may incline to deny it, to prove a distinction, and to show that a rule which, in the general system of things, is essential to the preservation of the social order, is inapplicable to the United States.

The circumstance that the powers of sovereignty are in this country divided between the National and State governments, does not afford the distinction required. It does not follow from this, that each of the portion of *powers* delegated to the one or the other, is not sovereign with *regard to its proper objects*. It will only *follow* from it, that each has sovereign power as to *certain things*, and not as to *other things*. To deny that the government of the United States has sovereign power, as to its de-

clared purposes and trusts, because its power does not extend to all cases, would be equally to deny that the State governments have sovereign power in any case, because their power does not extend to every case. The tenth section of the first article of the Constitution exhibits a long list of very important things which they may not do. And thus the United States would furnish the singular spectacle of a *political society* without *sovereignty*, or of a *people governed*, without *government*.

If it would be necessary to bring proof to a proposition so clear, as that which affirms that the powers of the federal government, as to *its objects*, were sovereign, there is a clause of its Constitution which would be decisive. It is that which declares that the Constitution, and the laws of the United States made in pursuance of it, and all treaties made, or which shall be made, under their authority, shall be the *supreme law of the land*. The power which can create the *supreme law of the land* in *any case*, is doubtless *sovereign* as to such case.

This general and indisputable principle puts at once an end to the *abstract* question, whether the United States have power to erect a *corporation*; that is to say, to give a *legal* or *artificial capacity* to one or more persons, distinct from the *natural*. For it is unquestionably incident to *sovereign power* to erect corporations, and consequently to *that* of the United States, in *relation* to the *objects* intrusted to the management of the government. The difference is this: where the authority of the government is general, it can create corporations in *all cases*; where it is confined to certain branches of legislation, it can create corporations *only* in those cases.

Here then, as far as concerns the reasonings of the Secretary of State and the Attorney General, the affirmative of the constitutionality of the bill might be permitted to rest. It will occur to the President, that the principle here advanced has been untouched by either of them.

For a more complete elucidation of the point, nevertheless, the arguments which they had used against the power of the govern-

ment to erect corporations, however foreign they are to the great and fundamental rule which has been stated, shall be particularly examined. And after showing that they do not tend to impair its force, it shall also be shown that the power of incorporation, incident to the government in certain cases, does fairly extend to the particular case which is the object of the bill.

The first of these arguments is, that the foundation of the Constitution is laid on this ground: "That all powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved for the States, or to the people." Whence it is meant to be inferred, that Congress can in no case exercise any power not included in those not enumerated in the Constitution. And it is affirmed, that the power of erecting a corporation is not included in any of the enumerated powers.

The main proposition here laid down, in its true signification is not to be questioned. It is nothing more than a consequence of this republican maxim, that all government is a delegation of power. But how much is delegated in each case, is a question of fact, to be made out by fair reasoning and construction, upon the particular provisions of the Constitution, taking as guides the general principles and general ends of governments.

It is not denied that there are *implied* as well as *express powers*, and that the *former* are as effectually delegated as the *latter*. And for the sake of accuracy it shall be mentioned, that there is another class of powers, which may be properly denominated *resulting powers*. It will not be doubted, that if the United States should make a conquest of any of the territories of its neighbors, they would possess sovereign jurisdiction over the conquered territory. This would be rather a result, from the whole mass of the powers of the government, and from the nature of political society, than a consequence of either of the powers specially enumerated.

But be this as it may, it furnishes a striking illustration of the general doctrine contended for; it shows an extensive case, in which a power of erecting corporations is either implied in, or

would result from, some or all of the powers vested in the national government. The jurisdiction acquired over such conquered country would certainly be competent to any species of legislation.

To return:—It is conceded that *implied powers* are to be considered as delegated equally with *express ones*. Then it follows, that as a power of erecting a corporation may as well be *implied* as any other thing, it may as well be employed as an *instrument* or *mean* of carrying into execution any of the specified powers, as any other *instrument* or *mean* whatever. The only question must be, in this, as in every other case, whether the mean to be employed, or in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to *regulate* the *police* of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes, because it is the province of the federal government to *regulate* those objects, and because it is incident to a general *sovereign* or *legislative* power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage.

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To this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the government, it is objected, that none but necessary and proper means are to be employed; and the Secretary of State maintains, that no means are to be considered as *necessary* but those without which the grant of the power would be *nugatory*. Nay, so far does he go in his restrictive interpretation of the *word*, as even to make the case of *necessity* which shall warrant the constitutional exercise of the power to depend on *casual* and *temporary* circumstances; an idea which alone refutes the construction. The *expediency* of exercising a particular power, at a particular time, must, indeed, depend on circumstances; but the constitu-

tional right of exercising it must be uniform and invariable, the same today as tomorrow.

All the arguments, therefore, against the constitutionality of the bill derived from the accidental existence of certain State banks, — institutions which happen to exist today, and, for aught that concerns the government of the United States, may disappear tomorrow, — must not only be rejected as fallacious, but must be viewed as demonstrative that there is a *radical* source of error in the reasoning.

It is essential to the being of the national government, that so erroneous a conception of the meaning of the word *necessary* should be exploded.

It is certain that neither the grammatical nor popular sense of the term requires that construction. According to both, *necessary* often means no more than *needful*, *requisite*, *incidental*, *useful*, or *conducive to*. It is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted by, the doing of this or that thing. The imagination can be at no loss for exemplifications of the use of the word in this sense. And it is the true one in which it is to be understood as used in the Constitution. The whole turn of the clause containing it indicates, that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are, “to make all *laws* necessary and proper for *carrying into execution* the *foregoing powers*, and *all other powers* vested by the Constitution in the *government* of the United States, or in any *department* or *officer* thereof.”

To understand the word as the Secretary of State does, would be to depart from its obvious and popular sense, and to give it a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word *absolutely* or *indispensably* had been prefixed to it.

Such a construction would beget endless uncertainty and embarrassment. The cases must be palpable and extreme, in which it could be pronounced, with certainty, that a measure was absolutely necessary, or one, without which, the exercise of a given power would be nugatory. There are few measures of any government which would stand so severe a test. To insist upon it, would be to make the criterion of the exercise of any implied power, a *case of extreme necessity*; which is rather a rule to justify the overleaping of the bounds of constitutional authority, than to govern the ordinary exercise of it.

It may be truly said of every government, as well as of that of the United States, that it has a right to pass only such laws as are necessary and proper to accomplish the objects intrusted to it. For no government has a right to do *merely what it pleases*. Hence, by a process of reasoning similar to that of the Secretary of State, it might be proved that neither of the State governments has a right to incorporate a bank. It might be shown that all the public business of the state can be performed without a bank, and inferring thence that it was unnecessary, it might be argued that it could not be done, because it is against the rule which has been just mentioned. A like mode of reasoning would prove that there was no power to incorporate the inhabitants of a town, with a view to a more perfect police. For it is certain that an incorporation may be dispensed with, though it is better to have one. It is to be remembered that there is no *express* power in any State constitution to erect corporations.

The *degree* in which a measure is necessary, can never be a *test* of the legal right to adopt it; that must be a matter of opinion and can only be a *test* of expediency. The *relation* between the *measure* and the *end*; between the *nature* of the *mean* employed toward the execution of a power, and the object of that power, must be the criterion of constitutionality, not the more or less of *necessity* or *utility*.

This restrictive interpretation of the word *necessary* is also contrary to this sound maxim of construction; namely, that the pow-

ers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good. This rule does not depend on the particular form of a government, or on the particular demarcation of the boundaries of its powers, but on the nature and object of government itself. The means by which national exigencies are to be provided for, national inconveniencies obviated, national prosperity promoted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means. Hence, consequently, the necessity and propriety of exercising the authorities intrusted to a government on principles of liberal construction.

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But the doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the national government is sovereign in all respects, but that it is sovereign to a certain extent; that is, to the extent of the objects of its specified powers.

It leaves, therefore, a criterion of what is constitutional, and of what is not so. This criterion is the *end*, to which the measure relates as a *mean*. If the *end* be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that *end*, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion, which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any State or of any individual? If it does not, there is a strong presumption in favor of its constitutionality, and slighter relations to any declared object of the Constitution may be permitted to turn the scale.

The general objections, which are to be inferred from the reasonings of the Secretary of State and Attorney General, to the

doctrine which has been advanced, have been stated, and it is hoped satisfactorily answered. . . .

It is presumed to have been satisfactorily shown in the course of the preceding observations:

1. That the power of the government, *as* to the objects intrusted to its management, is, in its nature, sovereign.

2. That the right of erecting corporations is one inherent in, and inseparable from, the idea of sovereign power.

3. That the position, that the government of the United States can exercise no power, but such as is delegated to it by its Constitution, does not militate against this principle.

4. That the word *necessary*, in the general clause, can have no *restrictive* operation derogating from the force of this principle; indeed, that the degree in which a measure is or is not *necessary*, cannot be a *test* of *constitutional right*, but of *expediency only*.

5. That the power to erect corporations, is not to be considered as an *independent* or *substantive* power, but as an *incidental* and *auxiliary* one, and was therefore more properly left to implication, than expressly granted.

6. That the principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to *incorporate* for purposes *within the* sphere of the *specified powers*.

And lastly, that the right to exercise such a power in certain cases is unequivocally granted in the most *positive* and *comprehensive* terms. To all which it only remains to be added, that such a power has actually been exercised in two very eminent instances; namely, in the erection of two governments; one northwest of the River Ohio, and the other southwest—the last independent of any antecedent compact. And these result in a full and complete demonstration, that the Secretary of State and the Attorney General are mistaken when they deny generally the power of the national government to erect corporations.

In the eyes of Talleyrand, Hamilton's supreme greatness lay in the fact that he divined Europe; to us, his countrymen, it lies in the incontrovertible fact that he divined, if he did not make, America.

At the bar, as in public and private life, Hamilton showed his contempt for popularity as such. If a cause or course of action commended itself to his judgment he held lightly the opinions of others. His self-reliance was superb in the contemptuous sense of the word. At the very beginning of his professional career as an advocate³⁰ he appeared for the defendant, the tory Waddington, against the widow Rutgers, whose brew and malt-house had been occupied by the defendant from 1780 to 1783, under license and permission of the Commander-in-chief (Sir Henry Clinton) at the rental of one hundred and fifty pounds a year, payable quarterly. By virtue of a statute of the legislature passed in 1783 the plaintiff brought trespass and counted in eight thousand pounds.

In an elaborate and reasoned opinion of great importance in the domain of constitutional law, but wide of the present purpose, the court held "that the plea of the defendant as to the occupancy of the plaintiff's brew-house and malt-house, between the 28th day of September, 1778, and the last day of

³⁰ Mr. John C. Hamilton has the following on the case of Rutgers vs. Waddington: "Hamilton now commenced his professional career and it is one of the interesting incidents of that career that the first exertions of his talents as an advocate, was in the cause of clemency and good faith." *Life*, vol. III, 11.

April, 1780; and the last plea of the defendant as to the whole of the trespass, charged in the plaintiff's declaration, are insufficient in the law; and that only the plea of the defendant in justification of the occupancy between the last day of April, 1780, and the 17th day of March, 1783, is good and sufficient in law."

This judgment raised such a storm that the House of Assembly of the state adopted a preamble and a resolution; but what is of greater interest is the information, "that Mr. Waddington, alarmed at these manifestations, and at the threatened appeal and writ of error, soon after compromised with Mrs. Rutgers."³¹ The appearance of Hamilton in such a case and at such a time, 1784, when he had been but two years at the bar, did not augur well for a political career; but then, as always, he held his head proudly in the air and scorned to lay his ear

³¹ Rutgers vs. Waddington was privately printed in 1866 by Henry B. Dawson, from a copy of the original of 1784. In the introduction Mr. Dawson says: "It is said that six of the Council were heard by the Court; and the following pages will show with what tact and ability the case was argued on either side. Unfortunately the files of the Court, in which were the pleadings and other papers in the action, were destroyed by fire, when the upper story of the City Hall was consumed, on the 1st of September, 1858; and there is no original evidence now in existence to show the particular parts in the arguments, which were taken by the several Councils employed." Pages 17, 18.

In the Life of John C. Hamilton, reliance is placed on an elaborate brief in his possession and the arguments printed in the report of the case are attributed to Alexander Hamilton, vol. III, 13-22.

See the case, comments, and annotations thereon in Thayer's Cases on Constitutional Law, vol. I, 63-72, and note on pages 72-73.

to the ground to know what or whether he should think. The populace was roused, but he won the admiration of the court, which said: "We cannot but express the pleasure which we have received in seeing young gentlemen [Hamilton and R. Livingston] just called to the bar, from the active and honorable scenes of a military life, already so distinguished as public speakers, so much improved in an arduous science."

So much for Hamilton's career at the bar, within which he was an ornament and a leader almost from his admission to the day of his death. Indeed his solicitude for the welfare of his clients was so great that he requested and secured a postponement of the fatal duel until he might wind up the various cases of his numerous clients. Greater independence and devotion it would be hard to find.

But great and justified as was Hamilton's professional success and reputation, it is as nothing compared to his service and standing as a statesman. Had he never tried a case, or if every case he ever tried were forgotten, his career as a statesman would be undiminished. His public services so overshadow his attainments as a lawyer that we either overlook or underestimate his professional eminence. And yet it was the study of the law, supplemented by the training at the bar, that made his judgment so keen, balanced, analytical and unerring, in matters of legislation and political service. The bar was, however, a means: the end was public life.

In the year 1782, the year of his admission to the bar, Hamilton was chosen a delegate to the Continental Congress and thus entered upon his civil career in national politics at the age of twenty-five. This statement should perhaps be qualified, because in June, 1782, Robert Morris, then at the head of the Treasury, appointed him Continental receiver of taxes for New York. National by appointment, the sphere of his action was local. In this position he displayed excessive activity, but the legislature refused to adopt his "clear and scientific plan of taxation to replace the impotent and chaotic system then existing." His appeal to and personal contact with the legislature were not, however, fruitless, for it passed a set of resolutions demanding a new convention and a better union of the states; and in the second place, the legislature was induced by personal knowledge and appreciation of the young man's abilities to elect him to Congress, in which discredited and wholly inefficient body Hamilton sat from November, 1782, until June, 1783.

That this body had fallen from grace was not so much due to its personnel, because it still contained some able and patriotic men; it was due rather to the fact that under the Articles of Confederation it possessed solely the power of recommending measures to the states, but had no power to enforce compliance with its requests. The states had never been over-obedient or respectful, but the danger of war with the possibility of subjugation held the states together

and a union of necessity may be said to have existed. The war was now over, and with relief from external danger the spirit of unity and with it the spirit of compliance vanished into thin air. Then, too, the reorganization upon a peace footing occupied the states and absorbed the energy and ability of the most distinguished citizens for local purposes. Again, the center of interest had shifted, because all eyes were turned to Paris where the Commissioners were negotiating the treaty of peace by which the independence of the states was to be recognized in law as it was in fact.

The Articles of Confederation provided that "in determining questions in the united states, in congress assembled, each state shall have one vote;" ³² that "the united states in congress assembled shall never engage in a war, . . . nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money . . . unless nine states assent to the same;" ³³ "nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state."³⁴ If Article II be borne

³² Article V.

³³ Article IX.

³⁴ Article XIII.

in mind—"each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this Confederation expressly delegated to the united states, in congress assembled"—and if it be remembered that this emasculated Congress possessed no power to coerce an unwilling or recalcitrant state, be it large or small, New York or Virginia, Rhode Island or Delaware, it is at once seen that it was merely a deliberative and advisory, not a legislative, assembly. Congress might recommend the laying of an impost and the collection of a revenue for national purposes; the state might agree or dissent, or agree and withdraw its consent. It might be persuaded by an appeal to national sentiment; it could not be forced into compliance; local pride and sensitiveness, local needs of the hour, appealed to local leaders, who turned a deaf and unwilling ear to the entreaties of nationalist or statesman.

Into such an assembly Hamilton entered in the closing months of 1782, and sought at once to galvanize it into action and to persuade the states to raise a permanent revenue. "The first object was to obtain consent to the grant of an impost on imports. One state had not been heard from, but Rhode Island was the only one in active opposition, and to the conversion of this obstinate and selfish little community Hamilton addressed himself. He it was who led the debate in Congress, who obtained a committee to visit Rhode Island and argue with

their government, and from his pen proceeded a forcible letter to the governor. Even while he was contending with Rhode Island, Virginia receded from the agreement and the whole scheme fell through. Had it succeeded, it would, if the states had held to it, have furnished a permanent revenue, and hence Hamilton's zeal.³⁵

Congress was a beggar; the nation, as a nation, was bankrupt, and local pride held the purse strings and drew them tighter. The agent of France returned to Trenton in 1784, in the expectation of the assembling of Congress, but there was no quorum. After waiting several days he reported: "There is in America no general government, neither Congress, nor president, nor head of any one administrative department."

The following paragraph shows the utter collapse of national authority, being what the late Mr. Fiske aptly termed the critical period of American history: ³⁶

A human society bound together by no stronger ties than those provided by the Articles of Confederation must tend naturally to anarchy. Even during the War of Revolution the weakness of the government seemed to many to portend financial ruin and a speedy dissolution of the Union. As soon as the pressure of war was removed the symptoms of disintegration grew alarmingly worse. Congress had become a mere Rump, without dignity, without power, and without a home. It was compelled to appeal repeatedly to the States before it could obtain a quorum of mem-

³⁵ Lodge's *Alexander Hamilton*, *American Statesman*, vol. VII, 38.

³⁶ Johnston's *American Politics*, ed. 1902, 148-9.

bers to ratify the treaty of peace. Many of the States refused or neglected to pay even their allotted shares of interest upon the public debt, and there was no power in Congress to compel payment. Eighteen months were required to collect only one-fifth of the taxes assigned to the States in 1783. The national credit became worthless. Foreign nations refused to make commercial treaties with the United States, preferring a condition of affairs in which they could lay any desired burden upon American commerce without fear of retaliation by an impotent Congress. The national standing army had dwindled to a corps of eighty men. In 1785 Algiers declared war against the United States. Congress recommended the building of five 40-gun ships of war. But Congress had only power to recommend. The ships were not built, and the Algerines were permitted to prey on American commerce with impunity. England still refused to carry out the Treaty of 1783, or to send a Minister to the United States. The Federal Government, in short, was despised abroad, and disobeyed at home.

But to return to Hamilton. His career in Congress impressed associates and contemporaries with a sense of his rare ability and boundless energy. Measured by results the year was absolutely fruitless. He withdrew in the summer of 1783 and devoted himself to the practice of his profession. His chief interest was, however, in politics, and he watched events as keenly from his desk in New York as did the other founder of America from the quiet retreat of Mount Vernon. The time had not yet come, but the rift in the clouds was discoverable. What national pride and a fine sense of honor at home and abroad had failed to do, the needs of commerce were to accomplish. While the purse-strings were

clutched firmly, an appeal to the conscience was vain; self-interest demanded an expansion of commerce and the regulation of interstate commerce opened the way for the Constitution.³⁷

It was done under the lead of James Madison. Virginia and Maryland had been negotiating together respecting their joint jurisdiction over navigation in the Chesapeake Bay and the Potomac River. Commissioners had agreed upon a plan which was laid before the legislature of each state. In December, 1785, Maryland signified to Virginia her acceptance of it, and at the same time proposed that Delaware and Pennsylvania be invited to coöperate in a plan for a canal between the Chesapeake and Delaware rivers. Thus a scheme of interstate commerce among some of the states was projected, which ought to extend upon just terms to all. Maryland proposed that all the states should be invited to meet and regulate the restrictions upon commerce. Madison, who was a member of the Virginia legislature, saw his opportunity. He prepared a resolution for the appointment of commissioners, to meet such commissioners as should be appointed by the other states, "to take into consideration the trade of the United States, to examine the relative situation and trade of the said states; to consider how far an uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony; and to report such an act to the several states relative to this great object as, when unanimously ratified by them, will enable the United States in Congress assembled effectually to provide for the same." This resolution he procured a Mr. Tyler, who was not suspected of wishing to give to the confederacy over-much power, to introduce. It was permitted to sleep until the last day of the session, when it was brought forward and adopted without debate. Madison was

³⁷ Landon's *The Constitutional History and Government of the United States*, revised edition, pp. 78-79.

placed at the head of the commission. This resolution was sent to the other states, and four of them responded.

The delegates of the five states, Hamilton representing New York, met at Annapolis on September 11, 1786, and as the result of their discussion recommended the meeting of commissioners from all the states to be held at Philadelphia on the second Monday in May, 1787, "to take into consideration the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union." The report was sent to their respective states and copies to the other states. Congress approved the recommendation of the meeting, provided it be "for the sole purpose of revising the Articles of Confederation" and that the proceedings of the Convention be reported to the Congress.

The needs of commerce, it has been said, convinced merchants of the necessity of some amendment to the frame of government. Shays's rebellion, breaking out as it did at this time in western Massachusetts, strengthened the hands of the men of law and order in other parts of the country. There must be some central power to regulate commerce in the interest of all, lest New York, for example, might prevent imports from the sister states by prohibitive duties; and it was no less evident that there must be some central and paramount force to put down the rebellion and anarchy so lately exhibited in western Massachusetts. What had happened there might

happen elsewhere, and although Citizen Jefferson might write from Paris about "once in twenty years watering the tree of liberty with blood of tyrants," men who had seen blood flow and knew what it meant thought and wrote otherwise. As Washington wrote to Lee: "You talk, my good sir, of employing influence to appease the present tumults in Massachusetts. I know not where that influence is to be found, or, if attainable, that it would be a proper remedy for the disorders. *Influence* is not *government*. Let us have a government by which our lives, liberties, and properties will be secured, or let us know the worst at once."

Shays's rebellion was indeed a fortunate event; if it plunged the country into the uttermost depths of darkness, it was the darkness that precedes the dawn. Happening as it did just before the meeting of the Convention, it permitted a choice between government and restraint on the one hand, and no government and anarchy on the other. It was not doubtful which way the beam would incline.

The next event of capital importance was the influence of Washington, and Madison labored incessantly to persuade the hope of a nation to head the movement. It was well known what Washington's sentiments were, and could he be persuaded, could he be made to feel that duty bade him leave Mount Vernon for Philadelphia, the success of the movement would be assured in advance. For had not Washington solemnly said and but recently: "I do

not conceive we can exist long as a nation without having lodged somewhere a power which will pervade the whole Union in as energetic manner as the authority of the State Governments extends over the several states. . . . To be fearful of investing Congress, constituted as that body is, with ample authorities for national purposes, appears to me the very climax of popular absurdity and madness." Shays's rebellion added to personal appeal turned the balance, and Washington headed the Virginia delegation to the Convention in which every state, except the Sovereign Commonwealth of Rhode Island, was represented.

It is not the purpose of this article to describe the proceedings of the Convention that met in May and adjourned in September with the completed and national constitution under which we live. It is enough to say that Madison planned the Convention and outlined its work; that Washington presided over its deliberations, and that Hamilton justified its ways to men. Hamilton's share in the outcome was slight: he was handicapped by the presence of two colleagues, Lansing and Yates, who were unalterably opposed to a national form of government and who withdrew early in the proceedings. It is not to be supposed that Hamilton was without a plan, for that well-ordered intellect could never approach a subject without giving to it a definite and detailed form. But his dream, rather than hope, was a nation in which the states should be subordinated to an ever-

present and all-pervading sovereign, resting upon the will of the people, it is true, but not upon a universal or direct suffrage. This plan he unfolded in a speech of great power and eloquence, and although it failed of its immediate purpose, as he well knew it would, there can be no doubt that the Constitution as actually framed bears silent but impressive testimony to the spirit that prompted and pervaded it. Hamilton presented his propositions and made his great address, occupying five hours in delivery, on June 18, 1787.³⁸

The Constitution was a compromise between the extreme national plan of Hamilton on the one hand, and the loose and local project championed by New Jersey. Expressed simply, the Constitution was a platform upon which the extremes might meet and stand. Satisfactory it was not to Hamilton, but it was at least a beginning and a working scheme of government. He loyally accepted it and strove by voice and pen to secure its adoption by the Convention to which it was submitted in New York. In this Convention he was outnumbered and outvoted, but the Convention ultimately adopted it "in full confidence" that certain amendments be made to the

³⁸ The Propositions are printed in Works, vol. I, 347-369; the brief for the speech,—370-378. Fragments of this and other speeches are preserved by Madison and Yates, printed in Works, vol. I, 381-420. Madison's reports are brief but accurate and had the advantage of the approval of Hamilton himself. The immediate effect of the proposals and speech was the defeat of the loose New Jersey plan. For the broader question as to influence on the Constitution, see note by Senator Lodge in Works, vol. I, 368-370.

instrument, but not until New Hampshire's vote had made the Constitution a reality. It will be remembered that the Constitution was not to go into effect until ratified by nine states, and New Hampshire was this ninth. News of the ratification of Virginia reached New York and the Convention went over to the little man whom the language of affection had not inaptly dubbed the "little lion." The ratification was real, not conditional, and New York, lying between New England and the South, was added to the Union.

Hamilton's speeches in the New York Convention were not only admittedly of the highest order, but they met the rarest test of greatness: they changed convictions and made votes. They exist, however, in a rude and fragmentary form which shows, notwithstanding the reporter's shortcomings, Hamilton's force and energy. Nor should the reporter be harshly judged. A frank confession mitigates though it cannot wholly disarm our judgment, for did not the reporter say: "He thinks an apology due for the imperfect dress in which these arguments are given to the public. Not long accustomed, he cannot pretend as much accuracy as might be expected from a more experienced hand?"³⁹ The *Federalist*, however, remains at once the defense and arsenal of constitutional theory and argument.

³⁹ See the Works, vol. II, 3-91, for the speeches; brief of argument on the Constitution of the United States, pp. 91-95; and Hamilton's draft of proposed ratification with specified amendments, pp. 95-100.

The Constitution was to go into effect on the fourth of March, 1789. That Washington was to be President was a foregone conclusion. The election of John Adams to the Vice-presidency was by no means so certain, but followed. In the distribution of the various offices it was certain that Hamilton would be designated for a position of power and trust. His friends considered that "the office of Chief-Justice of the Supreme Court of the United States would be in every way suited to the exercise of his discernment and judgment; and that he was well fitted for it by his accurate acquaintance with the general principles of jurisprudence." Of all this there could be no doubt. But his versatile talents, adapted equally for the bench or the bar, the field, the Senate, House, and the Executive Cabinet, were fortunately called to act in a more complicated, busy, and responsible station.⁴⁰ Washington would no doubt have agreed with these gentlemen in their opinion of the talents—we would rather say genius—of Hamilton, but he chose him for the Treasury. Hamilton accepted and justified the choice, and posterity approves both the selection and acceptance.

In one sense, the Department of State would have been a peculiarly happy selection, but it is common knowledge that Hamilton, none the less directed the foreign policy of the United States from his desk in the Treasury Department. It is also a matter of fact, which merely needs to be stated to be accepted,

⁴⁰ Kent's *Memoirs*, p. 312.

that none other than Hamilton could have directed the financial policy. The Confederation went to pieces for lack of revenue; and revenue was as essential to the new government as its lack was fatal to the old. This the brains of Hamilton devised and created, and in so doing he not only preserved the government for the time being; he created the United States of America. A strict and literal interpretation of the Constitution would have limited the government to the express powers; the creation and development of the implied powers in a concrete and visible form vested the government with the sovereignty that the Convention denied. Foiled in theory, he succeeded in practice. The history of our country is summed up in and clustered about three names: Washington, whose sword secured the independence of the colonies; Hamilton, whose statesmanship welded these colonies into a country; Lincoln, whose character preserved that nation which Washington planned and Hamilton made.

At the Treasury, Hamilton's work may be summed up in the impressive eulogy of Webster:

He smote the rock of the national resources, and abundant streams of revenue gushed forth. He touched the dead corpse of Public Credit, and it sprung upon its feet.

The economic measures as such are beyond the scope of the present article. They belong to the political economist and they must rise or fall by their own merit. Of this merit the trained economist

must necessarily judge, and economists are not wanting to question their economic soundness and expediency. But even his severest critic in the domain of economic science does not deny him the proud title of founder of the nation. Scientifically sound or unsound, these measures were not ends in themselves; they were rather means to an end, and this end was the establishment of our national government. To this end, far and beyond the question of dollars and cents, they were admirably adapted, and upon them securely rests—to quote Hamilton's own phrase—"Our National Government—the Rock of our Political Salvation." This fact is evident to a keen and trenchant critic who says: "Hamilton's work went to the making of the American State, but personally he may be said to have failed." This is unfortunately true, for, as the same critic observes, "when death overtook him he had no political future, and could have had none, unless he could have readjusted himself entirely to the conditions of American public life."⁴¹ This is the veriest truism: the system, however, survived not only exile and death, but the throes of a civil war. Even the sun is beclouded and sets in shame and darkness only to break forth with the radiance of the morning.

This same critic, an economist of national standing, subjected Hamilton's opinions on economic, and more especially on financial, matters to a thorough examination and criticism, and comes to the conclu-

⁴¹ *Life*, p. 27. For the letter, see *Works*, vol. III, 319, 341.

sion that "his attainments and his achievements in that domain have been greatly exaggerated." Be it so; Hamilton nevertheless remains the one political economist of national reputation. An examination from a single standpoint is generally dangerous. The microscope enlarges a defect into huge proportions; the natural surroundings are lost in the exaggerated view which distorts, if it does not destroy, the harmony of nature. The sun itself has spots, but it is nevertheless the source of energy and gives forth light and heat to an expectant and dependent world, notwithstanding the imprecations of astronomer and the revelations of the telescope. Tried by this standard, Washington cuts but a sorry figure. The classicist pronounces him ignorant of the rudiments of ancient culture; the professor of modern languages notes that he knew them not; and the purist finds fault with his English. The military critic maintains that his campaigns were but small affairs, and that he lacked genius and inspiration. He was undoubtedly inferior to each member of his cabinet in his peculiar specialty. So probably was Lincoln, but the humble minded fellow countryman devoutly and devotedly thanks God for both of them. Strip Hamilton of economic genius—talent cannot be denied him—and the statesman remains to console and bless.

Hamilton's interest in matters of finance was of long standing. For years he had had a bank on the brain. While in the army as military secretary and

busied with a thousand petty details, he nevertheless found time to take up the pen which had made him known before the war and which was to immortalize him within a few years in the *Federalist*. This maiden effusion in the financial line is supposed by Mr. Lodge to be addressed to Robert Morris and written early in 1780. Professor Sumner ascribes it to November of the previous year. Mr. Lodge is high in praise of the letter, saying: ⁴²

This little essay on inflated and depreciated currency is as valuable today as when it was written a century ago, and proves beyond question an inborn genius for finance, showing its author indeed to be entitled to stand with Turgot and Pitt as a pioneer in what has since become the most important department of practical government.

Mr. Sumner, on the contrary, is severe: ⁴³

The scheme of 1779 is crude in the extreme. . . . The scheme presents no workable device. It is related to those which every other man had in his pocket in 1875. Unfortunately, it is mutilated at the part where he undertakes to set forth how it would work.

In the concluding paragraph of the letter, Hamilton states that "the present plan is the product of some reading on the subjects of commerce and finance, and of occasional reflections on our particular situation." Upon this passage Mr. Sumner remarks: "It is not easy to see what he could have read." ⁴⁴

⁴² Sumner's *Alexander Hamilton*, p. 4.

⁴³ Sumner's *Alexander Hamilton*, pp. 108-109.

⁴⁴ Sumner's *Alexander Hamilton*, p. 109, in a footnote to which

It is impossible to reconcile these two conflicting opinions. If the essay does not show genius, it does at least betray talent and a natural liking for financial investigation. It shows the bent of his mind, and was on the whole a worthy exercise for a young man of twenty-three. The present writer would prefer to consider it rather as a trial or maiden essay. About his letter to Congressman James Duane, dated September 3, 1780, there are not, indeed there cannot be, two opinions.⁴⁵ The letter is, however, an analysis of the defects of the Confederacy and suggestions as to their correction. His recommendation of a single head to each department met with instant approval in the establishment of a Department of Foreign Affairs, of which Chancellor Livingston was the first secretary. Soon after three other executive departments were established, the Superintendent of Finance being Robert Morris.

To relieve the financial situation he proposes four means; a foreign loan, which should have been obtained long ago; taxes in kind; a bank founded on public and private credit; and taxes in money. The plan of the bank is briefly outlined.

On April 30, 1781, Hamilton wrote his long and able letter to Robert Morris containing a matured proposal for a bank.⁴⁶ Whether the project be ac-

page Professor Sumner gives some of the sources of Hamilton's economic reading.

⁴⁵ Works, vol. I, 213-239.

⁴⁶ Works, vol. III, 342-387. The bank is outlined in twenty arti-

cepted or rejected, this letter made it evident that Hamilton had found himself in matters of finance. The young man of twenty-four was a finished financier. In speaking of this letter and its great importance, Professor Sumner says: ⁴⁷

His bank was a paper-money machine, and the scheme of it contained financial fallacies which . . . he never conquered; but the boldness of the scheme, and the skill with which it was aimed at the difficulties of the situation, are most remarkable. It is the statesmanship of it which is grand, not the finance. He had seized the chief faults in the existing institution of government.

These letters or papers have been specifically mentioned in order to show that Hamilton had given much thought and reasoning to the subject of finance; that he had already served an apprenticeship, so that when he took charge of the Treasury under the Constitution he spoke as one having authority.

Of the many reports and measures recommended to Congress, three demand special mention, because they not only summed up his policy as secretary of the Treasury, but they are the foundations of his greatness as a minister of State. They are more than that: they are landmarks in the political history of the country. Their adoption established the public credit of the United States at home and abroad; they defined or rather divined, what bids fair to be the

cles — pp. 367–380 — to each of which Hamilton added remarks by way of explanation.

⁴⁷ Sumner's *Alexander Hamilton*, p. 114.

permanent policy of the country. But greater and more fundamentally important than these results—however desirable they might be—they announced and put into practical concrete effect, the implied powers of the Constitution, whereby the Nation was invested with the powers inherently residing in a sovereignty.

On January 9, 1790, Hamilton prepared the First Report on the Public Credit, which was sent to Congress on the 14th of the month. Professor Johnston says:⁴⁸

It consisted of three recommendations, — *first*, that the foreign debt of the Confederacy should be assumed and paid in full; *second*, that the domestic debt of the Confederacy, which had fallen far below par and had become a synonym for worthlessness, should also be paid at its par value; and *third*, that the debts incurred by the States during the Revolution, and still unpaid, should be assumed and paid in full by the Federal Government.

Hamilton's First recommendation was adopted unanimously. The Second was opposed, even by Madison and many moderate Anti-federalists, on the ground that the domestic debt was held by speculators, who had bought it at a heavy discount, and would thus gain usurious interest on their investment. Hamilton's supporters argued that, if only for that reason, they should be paid in full, that holders of United States securities might learn not to sell them at a discount, and that the national credit might thus be strengthened for all time to come. After long debate the second recommendation was also adopted.

Hamilton's Third recommendation involved a question of the powers of the Federal Government. It therefore for the first

⁴⁸ The admirable and brief account of the report and its provisions are taken from the late Professor Johnston's History of American Politics (edition of 1902, pp. 22-23). Works, vol. II, 227-289.

time united all the Anti-federalists in opposition to it. They feared that the "rope of sand" of the Confederacy was being carried to the opposite extreme; that the "money power" would, by this measure, be permanently attached to the Federal Government; and that the States would be made of no importance. But even this recommendation was adopted, though only by a vote of 31 to 26 in the House. A few days later, however, the Anti-federalists received a reinforcement of seven newly arrived North Carolina members. The third resolution was at once considered, and voted down by a majority of two.⁴⁹

As is well known, the passage of the third resolution was secured by what may be termed the first example of logrolling under the Constitution. The assumption of state debts was generally favored by the North; the opponents of the measure were principally from the South. The question of the capital was unsettled. This both North and South wanted. Hamilton and Jefferson, the secretary of state, had a little dinner together which has assumed national importance. The site of the capital seems to have been on the bill of fare. The result was that Jefferson persuaded his friends to vote for the assumption, and Hamilton saw to it that the capital was located in the present District of Columbia. Jefferson later suggested that he had been hoodwinked by Hamil-

⁴⁹ For a searching and unfavorable criticism of this Report, see Sumner's *Alexander Hamilton*, p. 144 *et seq.* See Hamilton's own defense, *Works*, vol. III, 3-24; vol. VIII, pp. 429-492; vol. IX, 3-24. These two defences win the commendation of Professor Sumner, who says: "They are both extremely able papers, the second being altogether the best paper which we possess from his hand." *Alexander Hamilton*, p. 147.

ton and had been made a party to a corrupt bargain. The viewpoint of Hamilton was simple. He was careless of geography: the site of the national capital was a matter of indifference to him, but a national policy and a national government were of prime importance. If he had any convictions on the subject, he sacrificed them promptly and cheerfully in the interests of policy.

It is impossible to overrate the importance of this first report. It redeemed the faith of the Nation and it turned the thoughts and interests alike of state and citizens to the Nation. The dinner incident, trifling as it would seem, is also important, for it marks the beginning of hostility and distrust between Hamilton and Jefferson, who saw when it was too late that he, the archpriest of states-rights, had played into the hands of the prophet of nationalism. The present writer holds a brief for Hamilton; let those who have a stomach for it pay tribute to Jefferson. These two great men stand at opposite poles and between them lies the history of our country.

The next great measure of Hamilton was the Report on Manufactures, which was sent to the House of Representatives on December 5, 1791.⁵⁰

The purport of this weighty measure, which bore no immediate fruit, but which has since become the seemingly permanent policy of the country, is well

⁵⁰ Works, vol. IV, 70-198. The studious reader is referred especially to Senator Lodge's careful note to this report, printed on pages 198-202.

expressed in the opening paragraphs, which are quoted in full: ⁵¹

The Secretary of the Treasury, in obedience to the order of the House of Representatives, of the 15th day of January, 1790, has applied his attention, at as early a period as his other duties would permit, to the subject of Manufactures, and particularly to the means of promoting such as will tend to render the United States independent of foreign nations for military and other essential supplies; and he thereupon respectfully submits the following report:

The expediency of encouraging manufactures in the United States, which was not long since deemed very questionable, appears at this time to be pretty generally admitted. The embarrassments which have obstructed the progress of our external trade, have led to serious reflections on the necessity of enlarging the sphere of our domestic commerce. The restrictive regulations, which, in foreign markets, abridge the vent of the increasing surplus of our agricultural produce, serve to beget an earnest desire that a more extensive demand for that surplus may be created at home; and the complete success which has rewarded manufacturing enterprise in some valuable branches, conspiring with the promising symptoms which attend some less mature essays in others, justify a hope that the obstacles to the growth of this species of industry are less formidable than they were apprehended to be, and that it is not difficult to find, in its further extension, a full indemnification for any external disadvantages, which are or may be experienced, as well as an accession of resources, favorable to national independence and safety.

As to the wisdom or folly of the protective system, no opinion is expressed. To discuss the subject is not within the province of the present article. The

⁵¹ Works, vol. IV, 70-71.

Report is the foundation of the American system and the document and history speak for themselves.⁵²

The third State paper of national importance is the recommendation to the House of Representatives, dated December 14, 1790, to establish a national bank.⁵³ The project itself is of no present importance, but in Hamilton's view a national bank was a necessity, and its organization had been a favorite project—the French would term it *l'idée fixe*—for many years. Its constitutional importance lies in the fact that there was no express authorization in the Constitution for its establishment. This authority was to be found, if at all, in the fact that the United States as a sovereignty possessed all powers necessary, convenient, or proper to carry into full effect the powers expressly granted. Jefferson and his school could not point the finger to an express grant of power. Hence the project was unconstitutional. It may be noted in passing that this stickler for strict construction of the Constitution furnishes the sole instance in our history of a President forcing a measure—the Louisiana Treaty—through Congress which he believed and admitted, wrongly enough it is true, to be unconstitutional. But theory and practice are different things, and statesmen as well as politicians are sometimes put to hard shifts.

Hamilton called the implied powers of the Con-

⁵² See the criticism of Professor Sumner both as to the construction and style of the report, and as to its doctrine, in Alexander Hamilton, pp. 172-183.

⁵³ Works, vol. III, 388-443.

stitution into being. As this matter has been sufficiently discussed in considering Hamilton as a lawyer, no further reference is necessary. Upon these three masterly papers Hamilton's reputation as a constructive statesman must always rest.

Turning now from domestic to foreign affairs, it is no exaggeration to say that his influence was as predominant as in his own peculiar domain. There can be no doubt that his activity in this sphere was peculiarly annoying to Jefferson, and it is easy to understand, without any great insight into human nature, that the latter considered him a meddler. It is true that Jefferson held strong views on Hamilton's domestic measures and opposed them in and out of the Cabinet. If it was wrong in one it was surely wrong in the other; but the simple truth is that Hamilton's views were right in both instances, and they prevailed. Jefferson had been minister to France, and either had or affected to have a great admiration for things French. The colonies owed their independence in great part, if not wholly, to the intervention of France in our Revolutionary War, and the young Republic owed to France a debt of gratitude. Then, too, the King had been overthrown, and a republic established, and thus sympathy was added to gratitude. The outrages in France were ascribed, and rightly, to centuries of oppression, and much should be pardoned to the spirit of liberty. If its excesses could not be condoned, at least sympathy should not be withheld. This was

undoubtedly the attitude of the people at large. When the war broke out between Great Britain and France in 1793, the good people of our young republic simply lost their heads, and clamored for special favors to France. Citizen Genêt was received as a hero, and fêted as if he were a conqueror, not a minister to a neutral country. Citizen Jefferson and the other citizens welcomed him like a lost brother. This not unnaturally turned the head of the envoy, who began to use this country as a basis of hostile operations against Great Britain. Washington became alarmed, because such conduct was unneutral, and if permitted must surely lead to war with Great Britain. The man of war, as so often happens, was a man of peace. Hamilton had also seen the horrors of war, and war neither he nor Washington would have. This was as humanitarian as it was sane; for the clear heads of the country saw that war would be as fatal as it would be impolitic, because our interests attracted us naturally to Great Britain. From France nothing was to be hoped in the way of trade or commerce.

Hamilton had always stood for law and order as established and guaranteed in the English Constitution. His sympathies seem to have been with France; his judgment inclined him to England, and enlightened selfishness irresistibly led to the same conclusion. The friends of England were strangely considered the enemies of liberty, silk stockings the emblem of tyranny, and patched trousers the safe-

guard of republican institutions. Hence Washington and his followers were aristocrats and Hamilton was a monarchist. The result is well known. The proclamation of neutrality, proposed by Hamilton, and based upon Jay's draft, was published. War with Great Britain was averted, and the modern doctrine of neutrality was grafted upon the law of nations.⁵⁴ As in the case of the Declaration of Independence, so in the proclamation of neutrality, Jefferson was but the scribe.

Two parties had grown up within the cabinet, headed by Hamilton and Jefferson, and the line of cleavage extended throughout the country at large. The Federalists stood by Hamilton and his policy both domestic and foreign; the Anti-Federalists, or Democratic-Republicans, stood for a strict construction and friendship with France. As Washington sided invariably with Hamilton, the position of Jefferson was anomalous, if not intolerable. He withdrew on December 31, 1793. Hamilton remained some time longer, resigning in 1795 to devote himself to his private affairs, which had greatly suffered through his tenure of office. Thus at the early age of thirty-eight, Hamilton withdrew from public affairs, and with the brief period of the rupture with France in 1798, when he was appointed major-general and inspector-general of the Army, he never again held office.

The expression "withdrew from public affairs"

⁵⁴ See Hall's *International Law* (5th edition), pp. 591-593.

is not wholly accurate, because Hamilton's interest in affairs of State ceased only on July 11, 1804, when he fell a miserable victim to a political quarrel in the duel with Aaron Burr. For the truth is that in or out of the Cabinet, Hamilton was the undoubted leader of his party, albeit John Adams held the presidency and the titular rank.

These last years were years of professional success and advancement at the bar; they were unfortunately years full of bitter quarrels and political rancor. But Hamilton's work as a constructive statesman was done, and it cannot be said that the nine years of retirement and political activity have added to his renown. His life was a busy life and fully twenty of his forty-seven years had been devoted loyally and unstintingly to the service of the public.

It is interesting but idle to speculate what the future might have been. In Hamilton's case speculation is irresistible. Chancellor Kent was fully convinced that, had not the bullet of a political madman closed his career, Hamilton would have had other claims—greater they could not well be—upon our admiration and gratitude. Chancellor Kent said:⁵⁵

Shortly before his death he revealed to me a plan he had in contemplation, for a full investigation of the history and science of civil government, and the practical results of the various modifications of it upon the freedom and happiness of mankind. He wished to have the subject treated in reference to past experience,

⁵⁵ Kent's *Memoirs*, pp. 328-330.

and upon the principles of Lord Bacon's inductive philosophy. His object was to see what safe and salutary conclusions might be drawn from an historical examination of the effects of the various institutions heretofore existing, upon the freedom, the morals, the prosperity, the intelligence, the jurisprudence, and the happiness of the people. Six or eight gentlemen were to be united with him in the work, according to his arrangement, and each of them was to take his appropriate part and to produce a volume. If I am not mistaken Mr. Harrison, Mr. Jay, Mr. Morris, and Mr. King were suggested by him as desirable coadjutors. I recollect that he proposed to assign the subject of ecclesiastical history to the Rev. Dr. Mason, and he was pleased to suggest that he wished me to accept a share of the duty. The conclusions to be drawn from these historical reviews, he intended to reserve for his own task, and this is the imperfect outline of the scheme which then occupied his thoughts. I heard no more of it afterwards, for the business of the court occupied all our attention, and after the May term of that year I saw him no more.

I have very little doubt that if General Hamilton had lived twenty years longer, he would have rivalled Socrates, or Bacon, or any other of the sages of ancient or modern times, in researches after truth and in benevolence to mankind. The active and profound statesman, the learned and eloquent lawyer would probably have disappeared in a great degree before the character of the sage philosopher, instructing mankind by his wisdom and elevating his country by his example. He had not then attained his forty-eighth year, and all his faculties were in their full vigor and maturity, and incessantly busy in schemes to avert distant dangers and to secure the freedom and promote the honor and happiness of his country.

I knew General Hamilton's character well. His life and actions, for the course of twenty-two years, had engaged and fixed my attention. They were often passing under my eye and observation. For the last six years of his life he was arguing causes before me. I have been sensibly struck, in a thousand

instances, with his habitual reverence for truth, his candor, his ardent attachment to civil liberty, his indignation at oppression of every kind, his abhorrence of every semblance of fraud, his reverence for justice, and his sound legal principles drawn by a clear and logical deduction from the purest Christian ethics, and from the very foundations of all rational and practical jurisprudence. He was blessed with a very amiable, generous, tender, and charitable disposition, and he had the most artless simplicity of any man I ever knew. It was impossible not to love as well as respect and admire him. He was perfectly disinterested. The selfish principle, that infirmity too often of great as well as of little minds, seemed never to have reached him. It was entirely incompatible with the purity of his taste and the grandeur of his ambition. Everything appeared to be at once extinguished, when it came in competition with his devotion to his country's welfare and glory. He was a most faithful friend to the cause of civil liberty throughout the world, but he was a still greater friend to truth and justice.

The language of eulogy has been exhausted in the attempt to do justice to the career of Alexander Hamilton; hasty and ill-formed judgments have reacted upon those who opposed him in life and denied him in death his due. It is always difficult to lay aside partisanship and sit in judgment upon friend or foe with philosophic calm. Especially is this the case with Hamilton, whose reputation grows with the growth of our country.

Nor is this reputation confined to America. Talleyrand was a man of keen intellect, whose judgment was not easily warped by friendship or moved by sentiment. He knew the man Hamilton as he knew the men and measures of his time in Europe,

and he has left a deliberate judgment on record:—
“I consider Napoléon, Fox, and Hamilton as the
greatest three men of our epoch, and if I might
judge these three, I should assign without hesitation
the first place to Hamilton. He divined Europe.”

However that may be, it is abundantly clear, at
least to the present writer, that Hamilton not only di-
vined but made the American nation, and that he is
the greatest single intellectual force in the history of
the United States.

ROBERT R. LIVINGSTON.

ROBERT R. LIVINGSTON

From the original bronze statue by Erastus Dow Palmer, in the
Capitol at Albany.



ROBERT R. LIVINGSTON.

1746-1813.

BY

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A SINGLE incident in the life of Chancellor Livingston rescues his name from the oblivion which unjustly would hide him from the eye of all but specialists in the history of our country.¹

On the 30th day of April, 1789, Chancellor Livingston administered the oath of office to George Washington upon the balcony of the old Federal Building in New York City, and after the administration of the oath, the Chancellor stepped forward, waved his hand, and exclaimed to a reverent and expectant multitude: "Long live George Washington, President of the United States!"

For a moment the man made himself the mouth-piece of the hopes and desires of a nation; the two men stand facing each other at the very beginning of a nation whose course is not yet run. School-books have seized upon this dramatic moment in the lives of both and the name of the lesser is indissolu-

¹ It is to be regretted that no adequate biography of Livingston exists.

bly linked in the mind of parent and child with the name of the Father of his Country.

And yet this episode is merely an incident in the life of Livingston, who has solid and independent claims to remembrance: a member of the committee to draft the Declaration of Independence; the first Secretary of State for Foreign Affairs; the negotiator of a treaty by which the national domain was doubled; and an associate of Fulton in the perfection and introduction of the steamboat by which commerce and industry were enhanced, if not wholly created. As a statesman and man of affairs his reputation is secure—indeed, Edward Everett Hale terms him “the wisest American of his time;” but the Chancellor’s gown becomes him much as a uniform befits a militiaman whose service is unknown to history although the epaulets were vastly fine.

Robert R. Livingston was born in the city of New York on the 27th day of November, 1746. It is common knowledge that the Livingston family was one of the most distinguished and important in the Colony, and the wealth and position of the family were such as to give a young man of fair parts a claim upon the public quite irrespective of individual merit or genius—unless genius accompanied by poverty appeared in the peculiarly striking and pleasing form of a Hamilton.

The Livingstons were people of character as well as of distinction. Of Scotch origin, the founder of the clan was one Robert, the son of a non-conform-

ist preacher who took refuge in Holland, then the asylum of the persecuted. The son came to New York in 1674 and prudently allied himself with the Van Rensselaers and Schuylers. Within a few years he possessed himself of the Livingston manor, embracing some hundred and twenty to sixty thousand acres on the Hudson River. From this vast tract some thirteen thousand acres, forming the manor of Clermont, were set off by the canny Scot for his son Robert, the grandfather of the future Chancellor. This second Robert possessed the sagacity of his race and a power of prophecy bordering on the marvelous. "I shall not see America independent, and, Robert," he said to his son, "you will not." Then addressing the gifted Richard Montgomery, who had married his granddaughter, he said, "You may." To his grandson, the subject of this sketch, he prophesied, "Robert, you will." As he died in the spring of 1775, he could not know how literally events would justify his intuitions.

The father of the Chancellor was Robert R. Livingston, who took to the law and obtained distinction on the bench. His devotion to the colonial cause was marked, and it cost him his position in 1774. Previous to this he stood out manfully for the rights of the colonies to tax themselves and opposed the fatuous policy of the British ministry. The project of taxing America was not wholly new, when Grenville tried it. Former ministers had considered the subject, but had wisely refrained from exercising

the power which undoubtedly existed, but was as undoubtedly injudicious. For example, Sir Robert Walpole said in 1732: "No, no; I will leave the taxation of America to some of my successors who have more courage than I have." And it is abundantly evident that Walpole was a man of courage. In like manner, when the subject was broached to Pitt, in 1759, that generous friend of the colonies replied with wisdom and warmth: "I will never burn my fingers with an American stamp act."

The fall of Quebec in 1761 and the territorial unity consequent upon the cession of Canada and the Floridas in 1763, led to thoughts of administrative and financial union. And it was not unnatural, at least far from unreasonable, that the colonies should be asked to contribute to the support of their governments. This they cheerfully would have done; but they were as unwilling to be taxed by a distant assembly in which they were only constructively represented, as they were to have the taxes paid into the imperial treasury and expended without control or suggestion.

Grenville as a lawyer knew that Parliament possessed the legal right; but he lacked the statesman's insight to see what his predecessors had both felt and expressed, that imperial taxation would be dangerous if not fatal. The Stamp Act of 1765 was passed, and the colonies were in a flame of indignation. Of the Stamp Congress, which met in New York City in 1765, Livingston, the father, was a member, and

he drafted the Address to the King, adopted on October 22, 1765. The address, while it breathed the spirit of loyalty and devotion to the royal family, was yet clear on the rights of the colonies, as appears from the following quotation:

The invaluable right of taxing ourselves and trial by our peers, of which we implore your Majesty's protection, are not, we most humbly conceive, unconstitutional, but confirmed by the great Charter of English Liberties.

This was clear doctrine and in line with the advice of Coke: "Take we heed what we yield unto; Magna Charta is such a fellow that he will have no sovereign."

As is well known, the obnoxious act was repealed, but although the ministry yielded for the moment, the right to tax, safeguarded as it was by a declaration of the power, was not renounced. However, the details of these years are foreign to the present purpose. The activity of the father is cited merely to show the inheritance of the son.

Robert, junior, entered in due time King's College, the present Columbia University in the city of New York, and graduated with the class of 1764. Like his classmate, friend, and political rival at a later period, John Jay, he, too, had a commencement part. Jay chose Peace; Livingston, Liberty. It would seem that liberty won over peace, or at least the enthusiasm, as befitted the subject, was noisier. For example, The New York Gazette of May 30, 1764, lavished its praise with an unstinted hand:

In particular, Mr. Livingston, whose oration in praise of liberty was received with general and extraordinary approbation, and did great honor to his judgment and abilities in the choice of his subject, the justice and sublimity of his sentiments, the elegance of his style, and the graceful propriety of his pronunciation and gesture; and many of the audience pleased themselves with the hopes that the young orator may prove an able and zealous asserter, and defender, of the rights and liberties of his country, as well as an ornament to it.

The young orator, whom Franklin later compared to Cicero, decided upon the study of law and entered the office of William Smith and later that of William Livingston, relative and Revolutionary governor of New Jersey. Admitted to the bar in October, 1773, his admiring biographer relates that he became very eminent in the profession. It would be more accurate to say that family influence secured him the recordership of New York in 1774, but revolutionary tendencies cost him the place within a twelvemonth. In the brief interval between admission and the recordership, the friends and classmates, John Jay and Livingston, formed a partnership; but the firm could not have had a large practice unless our grandsires were less wary than are the business men of today.

The true state of affairs appears in the following, delightful letter from Livingston's grandfather:

I recd. yrs. of the 6th of March; but your good father opened it by mistake; consequently he knew you had applied to me, in pursuance of my orders, for a little money, in case you should be straitened, which I take in good part. Yr. daddy was a little

out of humour, alledging you was a little too lavish, but I told him you could not receive cash for law, till bills were taxt, and then not to be too hasty, which would look necessitous and griping wherein he acquiesced.

However that may be, the young man was caught up in the whirl of politics and when he finally withdrew from political life, he did not return to the bench or bar, but devoted himself to perfecting the steamboat and to the improvement of the condition of agriculture in the state and county at large. His claim to the respect of the profession must rest upon his tenure of the Chancellorship, and of that, as will appear later, there exist practically no records.

Had Livingston's heart been set on the practice of law the stirring events of 1775 and 1776 would have rendered it well-nigh impossible. The Independence year would have forced him either from New York or into acceptance of British domination in his native city. But the young man was loyal to the interests of the Colony as he understood them, and duty, not ambition, forced him into the rebel camp. In the Second Continental Congress he was a member from New York, and he took an active and honored, indeed prominent part in the debates and deliberations of that famous body. He was placed upon the committee to prepare and report a plan of confederation for the colonies. This was in itself a vote of no mean confidence. But the culmination of his early career was reached in being chosen a member of the Committee of Five to draw up

and prepare, in accordance with Richard Henry Lee's birth-giving resolution of June 7, 1776, the Declaration of Independence. The Committee itself was composed of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingston. To be the worthy associate of such men was in itself a certificate of immortality. This short cut to posterity was missed by Jay, who had been recalled to New York, and Livingston's recall prevented his signature to the fundamental charter of American liberty. Had Jay remained in Congress it is probable that his hand would have drafted the immortal instrument, for his skill and ability as a draftsman were the admiration and delight of his countrymen. His solid attainments in many and other fields of achievement compensate us, although they do not extinguish the regret that his hand neither drew nor signed the Declaration. With Livingston, the absence has militated against his renown, inasmuch as it debarred him from figuring among the "Lives of the Signers."

The credit of drafting the instrument belongs solely to Jefferson, for the Committee proposed few and unimportant amendments. The ideas of the Declaration were the ideas of the time, and were in no way original with Jefferson or with his associates; they were in the air. The enumeration of the grievances was far from difficult, for they were fresh in the minds of all. The philosophy of the Declaration was the philosophy of Locke, the common herit-

age of the colonists as Englishmen, and the subject of daily talk. In view of all this, Jefferson's work was simply the work of a scribe; but the literary style, to which the instrument in no small measure owes its renown, was Jefferson's, and the credit of the composition is solely his own. To deprive him of this were as unjust as it would be to credit him with originality in the philosophic basis of the immortal instrument.

As previously stated, Livingston's recall prevented him from signing the Declaration, and for the next two years he was intimately associated with Jay in framing a constitution, and in organizing the government of New York. These labors, while of fundamental importance to the colony, were local in their nature and fame, and the two classmates and friends, though in public life, were lost to the nation for a few years.

In the apportionment of offices in 1777, Jay was made chief-justice and Livingston, chancellor. With the exception of 1781 to 1783, when he was the first secretary of foreign affairs, Livingston was chancellor of the state until his final resignation in 1801. And in this connection it is perhaps of interest to note that Jay and Livingston resigned their respective positions of chief-justice of the United States and chancellor of New York for political place. There was, however, this difference: Jay resigned at the end of his diplomatic mission to Great Britain in order to accept the governorship of New

York, while Livingston resigned to enter upon his mission to France.

New York passed from the control of the Dutch in 1664. With English rule came English courts, and English practice. Common Law and Equity took up their permanent abode in the Duke of York's colony. "The permanent judicial establishment of the Province of New York owed its origin to the Assembly of 1691. A Supreme Court of Judicature, possessing the jurisdiction of the English Courts of King's Bench, Common Pleas and Exchequer, was then created."² The courts of law met with approval in the abstract if not always in the concrete. The Chancery, on the other hand, was treated as an exotic—at most, tolerated when not actually abolished; never approved. Mr. Fowler says:³

The Court of Chancery of the Province, originally erected by the act of 1683, was remodelled by the "Act for establishing courts of judicature," passed in 1691. This act, continued from time to time, . . . finally expired. On the 28th of August, 1701, an ordinance was issued re-establishing the chancery and authorizing the governor and council, or any three of them to hold the court. In June, 1702, its operations were suspended until a fee bill should be settled, and it was not again revived until the 7th day of November, 1704.⁴ . . . At various times the lower house of Assembly protested against the establishment of a court of equity by the

² Bradford, 1694 ed., *New York Laws*, p. 2.

³ For details in regard to the opposition to the Court of Chancery see an excellent series of articles by Mr. Robert Ludlow Fowler, entitled "Observations on the Particular Jurisprudence of New York," published in the *Albany Law Journal*, especially vol. XXII, pp. 288-292.

⁴ Citing, 2 R. L. 1813, Appendix vii.

governor without their concurrence; but notwithstanding this fact the Court of Chancery, until the year 1711, continued to be held by the governor and council, by virtue of the ordinance mentioned. Subsequent to the year 1711, the governor alone sat as chancellor.

The very early establishment of a Chancery Court in New York was one of several causes contributing to the relative preëminence of its particular jurisprudence. In many of the American colonies equity jurisprudence had, prior to the War of Independence, no distinct existence in any large and appropriate sense. In the Province of New York there was, however, a tendency to more closely conform to English precedents.⁵ Matters of equity, as distinct from cases cognizable at law, were recognized by the "Duke's Lawes" of 1665, while a Court of Chancery was *eo nomine* established by the act of 1683. It must be conceded, that there was a strong popular prejudice against the discretionary power of the chancellor, which was thought to be bounded by no very defined limit, and to conceal the undefined prerogative with which colonial principles were ever at war. But it has been said that the true grounds of the hostility of the people of New York to the equity courts was their jurisdiction of the King's quit-rents — always greatly in arrears.⁶

The proceedings of the Court of Chancery in New York were, doubtless somewhat intermittent; ⁷ Blake and Johnson has thought that this tribunal transacted but little business prior to the Revolution of 1775-6,⁸ but it is more than probable that the opinion of these gentlemen was founded on the statement of the historian Smith, "that the wheels of chancery have ever since (1727) rusted upon their axis" — "the practice being contemned by all gentlemen of eminence in their profession."⁹ It must be remembered,

⁵ Citing, Smith's History of New York, vol. II, 320.

⁶ Citing, Lond. Doc., vol. XXIV, 880.

⁷ Citing, Blake's Introduction to Chancery Practice.

⁸ Citing, Johnson's Introduction to Chancery Practice.

⁹ Citing, Smith's History of New York, vol. I, 280.

in this connection, that Mr. Smith, though living at the time of which he wrote, was far from an impartial witness. His father had been engaged professionally in the hostile attack on the court of equity in Governor Cosby's administration, and had thus become a leader of the popular party. The historian Smith followed the political bias of his father, though at the beginning of the Revolution he abandoned the popular party and became a judge under the Crown, in Canada. The late Judge Hoffman, who, years afterward, gave the subject the closest attention, seems to have had a very different estimate of the volume of chancery business in the Province as well as of comparative importance.¹⁰ Doubtless the Albany records of the Provincial Court of Chancery confirm the latter's view.

The early establishment of a Court of Chancery in New York was, in several aspects, important; it contributed to its jurisprudence the symmetry which that of many of the other colonies lacked, and it finally led to the constitutional recognition of the office of chancellor, possessing almost the powers of the lord chancellor in England.¹¹ It is now difficult to estimate the influence exercised for over half a century by the chancellors of the State of New York, not only within their own proper sphere, but as well in the formation of equity jurisprudence in its American phase. Without the chancery reports of this State, it is needless to say that the New York contributions to practical administrative jurisprudence would be greatly diminished in value. True it is, that Justice Story has said that equity was scarcely felt in New York until about the time of Caine's and Johnson's reports.¹² But it is not strange that the influence of equity jurisprudence was greatly augmented by the efforts of the reporters. That their influence was at once so extensive depended, however, on the highly developed condition of the equity administration at the time the reports began in New York. Taking into consideration

¹⁰ Citing, Hoffman's Chancery Practice, pp. 11-14.

¹¹ Citing, Campbell and Camberling's Chancery Digest, p. xi, Preface.

¹² Citing, Story's Equity Jurisprudence, section 56.

the fact, that equity jurisprudence was greatly neglected in many of the Anglo-American colonies, and that until Lord Hardwick's time the administration of equity, even in England, presented many uncertainties, it is a remarkable fact that the ameliorating tendency of equity was recognized in New York in the very beginning of its political life.

The Court finally established in 1704 withstood constant and bitter opposition by the State Constitution of 1777. Of this state court Livingston was the first chancellor.

The nature of the opposition to the Court is nowhere better evidenced than in the following resolutions of the General Colonial Assembly, dated November 25, 1727.¹³

Resolved, That the erecting or exercising in this colony a Court of Equity of Chancery (however it may be termed) without consent of the General Assembly, is unwarrantable and contrary to the laws of England, a manifest oppression and grievance to the subjects, and of pernicious consequences to their liberties and properties.

Resolved, That this House will, at the next meeting, prepare and pass an act to declare and adjudge all orders, ordinances, decrees and proceedings of the court, so assumed to be erected and exercised as above mentioned to be illegal, null and void, as by law and right they ought to be.

Resolved, That this House at the same time will take into consideration whether it be necessary to establish a Court of Equity or Chancery in this colony, in whom the jurisdiction thereof ought to be vested, and how far the powers of it shall be prescribed and limited.

Even in our own day rightly or wrongly the lay

¹³ Albany Law Journal, vol. XLV, 13, Biographical Department.

public looks upon the courts of law and the trial, often mistrial, by jury as the safeguard of a popular and well-ordered liberty. The common lawyer detested the court party and the common lawyer has been looked upon as the peculiar defender of liberty.

The absence of the jury; a jurisdiction regularly exercised by ecclesiastics until the Reformation; a system of procedure based in part, at least, upon the Roman law, which to the populace was synonymous with "Popery"; the lack of a scientific system resting upon precedent; and the large discretion vested in and exercised by the chancellor according to the dictates of conscience, were undoubtedly the chief reasons why chancery was unpopular and distrusted. The feeling existed that chancery was in some way the personal instrument of the king, and that it was therefore an instrument of tyranny. It is not perhaps going too far to say that Selden's *Table Talk* pilloried chancellor and court alike for a century and more. "Equity," said the liberty-loving Selden, "is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make his foot the standard for the measure we call a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, and another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's con-

science.”¹⁴ And the foot, whether large or small, broad or narrow, was always heavy.¹⁵

But to revert to Chancellor Livingston. The one undisputed fact in his chancellorship is that he held the position from 1777 to 1801. Of his fitness for the position which he undoubtedly filled, no records

¹⁴ The following extracts from the decrees of two learned equity judges will show that the chancellor's foot and the chancellor's conscience have been discarded as the measure of relief administered in a court of equity: “The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with each succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.” *Gee vs. Pritchard*, 1818, 2 Swanston's Reports, 402, per Lord Chancellor Eldon.

“I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: The separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence; and, therefore, in cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved; and if we want to know what the rules of Equity are we must look, of course, rather to the more modern than the more ancient cases.” *In re Hallett's Estate*, Law Reports, 13 Chancery Division 696, 710, per Jessel, Master of the Rolls.

¹⁵ “A little before this time there was a breach between the Lord

exist, or are too scanty to justify a confident opinion. To the writer his fitness seems best to rest upon the fact that he was the first chancellor and that such a severe judge of men and measures as John Jay should have been a party to his selection. The bias of friendship counted for nothing with Jay, and had

Chief Justice Coke and the Lord Chancellor Ellesmer, which made a passage to both their declines. Sir Edward Coke had heard and determined a Cause at the Common Law, and some report there was juggling in the business. The witness that knew, and should have related the Truth, was wrought upon to be absent, if any man would undertake to excuse his non-appearance. A pragmatical fellow of the party undertook it, went with the witness to a Tavern, called for a Gallon pot full of Sack, bid him drink, and so leaving him went into the Court. This witness is called for as the prop of the Cause, the Undertaker answers upon Oath. He left him in such a condition, that if he continues in it but a quarter of an hour, he is a dead man. This evidencing the man's incapability to come, deaded the matter so, that it lost the Cause. The Plaintiffs that had the Injury bring the business about in Chancery; the Defendants (having had Judgment at Common Law) refuse to obey the Orders of that Court, whereupon the Lord Chancellor for contempt of the Court commits them to prison. They petition against him in the Star-Chamber, the Lord Chief Justice joyns with them, foments the difference, threatening the Lord Chancellor with a Premunire. The Chancellor makes the King acquainted with the business, who sent to Sir Francis Bacon, his Attorney General, Sir Henry Montague, and Sir Randolph Crew, his Sergeants at Law, and Sir Henry Yelverton, his Solicitor, commanding them to search what Presidents there have been of late years, wherein such as complained in Chancery were relieved according to Equity and Conscience, after judgment at Common Law. These being men well versed in their Profession (after canvassing the matter thoroughly) returned answer to the King, That there hath been a strong current of Practice and proceeding in Chancery, after Judgment at Common Law, and many times after execution, continued since Henry the seventh's time, to the Lord Chancellor that now is, both in the Reigns (seriatim) of the several Kings, and the times of the several Chancellors, whereof divers were great learned men in the Law; it being in Cases where there is no Remedy for the subject by

he not known Livingston to be qualified, he would not have acquiesced in the selection. The absence of reports—for it was only with Kent's chancellorship that Johnson began his justly celebrated reports—and the fragmentary records of the Council of Revision, render it impossible to form an adequate or definitive estimate. The language of Jefferson, while perhaps too general, is at least expressive of the common view of his contemporaries: "Robert R. Livingston is in every sense of the word, a wise, good and great man, one of the ablest of American lawyers and statesmen."

The opinion of Mr. Robert Fowler, based as it is upon personal study, is much to the same effect:¹⁶

Without in the slightest degree detracting from the fame of Chancellor Kent's labors in the Court of Chancery, it is but common justice to his predecessors—and this his panegyrists seem to forget—to acknowledge the value of what we know of their work; and in this connection it must be noticed that Kent found the Court of Chancery of New York exercising a vast jurisdiction fully established on very ancient foundations.

The equity decisions of Chancellor Livingston have never been published, and in consequence there are no data, other than the records of the court, and perhaps his private papers, to determine the precise character of his administration of the Court of Chancery. It has, however, been said on the high authority of Chan-

the strict course of the Common Law unto which the judges are sworn. This satisfied the King, justified the Lord Chancellor, and the Chief Justice received the foil; which was a bitter potion to his spirit, but not strong enough to work on him as his enemies wished." Wilson's *Life of James*, vol. I, 94, 95, quoted from Ames' *Cases in Equity Jurisprudence*, Part I, footnote p. 5.

¹⁶ 4 Johnson's Chancery Reports, 439.

cellor Jones, "that this august tribunal, though since covered with a halo of glory, never boasted a more prompt, more able or more faithful officer than Chancellor Livingston."¹⁷ Those decisions of Chancellor Livingston bearing on jurisprudence, and preserved in the records of the council of revision, indicate the same qualities which so distinguished his career as a statesman and diplomat¹⁸ and surely confirm to the ordinary mind the laudatory of Chancellor Jones.¹⁹

In other words, as with Jay, the best justification of the appointment is the solid and substantial record of statesman and diplomat which both he and Livingston have left to the world. This view is likely to be just, for it is based upon the career as a whole, not upon an isolated passage or incident.

The language of eulogy has been given; that of detraction should not be omitted. The halo referred to by Chancellor Jones, it is almost needless to add, was derived from Kent, whose testimony in this matter is as pointed as it is unfavorable. He says:²⁰

In 1814 I was appointed Chancellor. The office I took with considerable reluctance. It had no charms. The person who left it was stupid, and it is a curious fact that for the nine years

¹⁷ Francis's Address to the Philolexian Society of Columbia College, 1831, p. 29.

¹⁸ Debates on Ratification of Federal Constitution, 1788, and Livingston's Diplomatic Correspondence.

¹⁹ Albany Law Journal, vol. XXIII, 287.

Chancellor Livingston's "Rules in Chancery" were not published. See, however, a reference to them in Johnson's Chancery Reports, p. 328.

²⁰ William Kent, *Memoirs and Letters of Chancellor Kent*, pp. 157-158.

I was in that office there was not a single decision, opinion, or dictum of either of my two predecessors (Chancellor Livingston and Chancellor Lansing) from 1777 to 1814, cited to me or even suggested. I took the court as if it had been a new institution and never before known in the United States.

But however that may be, the first Chancellor will always be a great figure, and the transfer of great lawyers and judges from the bench to manage affairs of state at home and abroad, would not come amiss in our own day and generation. The judicial mind displays itself admirably in the larger and complicated problems of administration, and in diplomatic missions. The success of the experiment justifies repetition, and it may be said in passing that the career of Mr. Joseph H. Choate in Great Britain might well give us pause and turn our thoughts to Revolutionary precedent.

Chancellor Livingston was, it has been said, the first secretary of foreign affairs from 1781 (August 10) until the return of his friend John Jay in 1783. The period is an important one in our development, but interest is centered in Paris where Franklin, Jay, and Adams were negotiating the treaty whereby independence was recognized. Livingston's tenure of foreign affairs is therefore relatively uninteresting, and is for present purposes only valuable as supplying a broad and ample training for his diplomatic triumph in France.

These two years cannot, however, be passed in silence, for as first secretary of state, Livingston or-

ganized the department and directed the foreign policy of the country at a critical period. The following paragraph by Dr. Francis Wharton affords material for an intelligent judgment of Livingston's ability as minister of foreign affairs:

Livingstone, though a much younger man than Franklin, possessed in his dispassionateness and his many sidedness, not a few of Franklin's characteristics. From his prior administrative experience as royalist recorder of New York he had at least some acquaintance with the practical government in America; his thorough studies as a scholar and jurist gave him a knowledge of administrative politics in other spheres. As secretary of foreign affairs, in 1781-1783, he did more than any one in the home government in shaping its foreign policy. But the system he indicated was, as will be seen, not the "militia" system of unsophisticated impulse, but that which the law of nations had at the time sanctioned as the best mode of conducting international affairs.

His course as secretary was based on the law of nations as thus understood by him. He at once accepted Franklin's position — that it was unwise, as well as against international usage, for the United States to send ministers to foreign courts without some intimation that they would be received. He saw that from the nature of things the then neutral courts of Europe would not throw away the advantages of their neutrality by entering into an alliance with the United States, which, as a revolutionary republic, as absolutists, could have no desire to encourage. He therefore advised the recall of Dana, and he opposed any further efforts being made to send ministers to European courts by whom such missions were not invited. Acting also on the principle that a minister to a foreign court must be a *persona grata*, and aware of Franklin's transcendent gifts as a negotiator, as well as of his great acceptability to France, to Franklin he gave his unwavering support. Of the unrelenting animosity to America of the British government he, as well as his relative and friend, Jay, to whom

he was strongly attached, made no question; and no part of his diplomatic work was more labored than that which comprised his efforts to collect materials, based on the cruelties of the war, to show that no settlement which did not admit independence was practicable. The alliance with France he considered sacred, France having performed faithfully her engagements to us, and we being bound to perform faithfully our engagements to her; and for this reason he disapproved of the action of the peace commissioners in negotiating with England without concert with France.

A letter, first published by Doctor Wharton, dated February 18, 1782, from Livingston to Harrison, governor of Virginia, illustrates Livingston's adhesion to diplomacy as a system: ²¹

I do myself the honor to transmit your excellency several resolutions of Congress which, having a reference to the department of foreign affairs, are in course to go through this office. The necessity of carrying them into effect is too obvious to need observations. While we hold an intercourse with civilized nations we must conform to laws which humanity had established and which custom has consecrated among them. On this the rights which the United States or their citizens may claim in foreign countries must be founded. The resolution (No. 2) passed Congress in consequence of a convention about to be concluded between his most christian majesty and the United States of America, which affords an additional reason for paying it the earliest attention. Your excellency and the legislature will see the propriety of rendering the laws on these subjects as simple and the execution of them as expeditious as possible, since foreigners, who are the great object of them, are easily disgusted at complex systems which they find a difficulty in understanding, and the honor and peace of a

²¹ Wharton's *Diplomatic Correspondence of the American Revolution*, vol. I, 569, 597.

nation are frequently as much wounded by delay as by a denial of justice.

In 1783 the Secretary returned to New York and resumed the duties of the chancellorship, when his first trial term was rendered illustrious by the case of Schuyler vs. Ten Eyck, in which Aaron Burr and Alexander Hamilton were opposing counsel.

At this time Livingston was a Federalist and believed in a strong if not a centralized government. His experience in Congress and as secretary of Foreign Affairs, convinced him of the inefficiency of the articles of confederation. In a much admired discourse delivered on the 4th of July, 1787, before the New York State Society of Cincinnati, the Chancellor expressed himself both wisely and well:

Nothing presents itself to my view, but a nerveless council, united by imaginary ties — brooding over ideal decrees, which caprice or fancy is at pleasure to annul or execute. I see trade languish, public credit expire, and that glory which is not less necessary to the prosperity of a nation than reputation to individuals, a victim to opprobrium and disgrace, and who will deny that the most serious evils daily flow from the debility of our Federal Constitution?

Who but owns that we are at this moment colonies, for every purpose but that of internal taxation, to the nation from which we vainly hoped our sword had freed us? Who but sees with indignation British ministers daily dictating laws for the destruction of our commerce? Who but laments the ruin of that brave, hardy, and generous race of men, who are necessary for its support? Who but feels that we are degraded from the rank we ought to hold among the nations of the earth; despised by some,

maltreated by others, and unable to defend ourselves against the cruel depredations of the most contemptible pirates?

The recognition of these sources of weakness had become universal and the Constitution of 1787 was the practical embodiment of the hopes and desires, nay, even of the prayers of those who could not bring themselves to contemplate with equanimity the loss of the fruits of independence.

In the convention of 1787 Livingston had no seat; in the New York Convention for the ratification of the Constitution he was chairman and contributed not a little to its adoption. And as stated at the beginning of the article, it was Chancellor Livingston's supreme good fortune to administer the oath of office to Washington.

Within a few years from this historic moment, Livingston went over to the opposition, leaving the aristocratic party of the state in whose ranks he had been an honored leader, to associate with the Clintons and the "sans culottes," to heap abuse upon Great Britain and to propose toasts at banquets to the Franco-American alliance: "May the present coolness between France and America produce, like the quarrels of lovers, a renewal of love."

Politics, they say, make queer bedfellows, and the queerness is not always hidden under the clothes. Chancellor Livingston and John Jay, classmates, law partners, and life-long friends, were rival candidates for the governorship of New York in 1798. Jay was elected, but the campaign was far from agree-

able. Livingston had, however, enlisted with the Jeffersonians, and in the triumph of the leader, the follower shared.

Indeed the pleasant associations of the Declaration of Independence seemed likely to be renewed. In the year 1800, Livingston, Clinton, and Burr, were seriously considered for the Vice-presidency.²²

Before the election, Jefferson offered Livingston the secretaryship of the navy, which was declined; but the year 1801 found the Chancellor in Paris as American minister, in which place and in which capacity he rendered the greatest political service to his country.

The navigation of the Mississippi had worried the south and west for twenty years and more, but the question was to be settled once and for all by the acquisition of the river and its immense watershed by the United States. Great Britain settled the Atlantic seacoast; northern colonists pushed to the west and added the Northwest Territory to the ample domain of the young republic. The south likewise spread to the west and threatened the Mississippi. For this vast inland empire the Mississippi was the natural and only outlet, and the mouth of the river was in

²² To quote from Parton's *Life of Burr*: "A Republican caucus was held for the purpose of deciding upon a candidate for the Vice Presidency. The choice lay between three men, Chancellor Livingston, George Clinton, and Aaron Burr. It was concluded that Chancellor Livingston's deafness was an insuperable objection to an officer who would have to preside over a deliberative body, and he was set aside. The nomination was given to Aaron Burr. Jefferson and Burr were elected."

foreign hands. To reach the sea was the aim of American policy, and the rapid industrial and political growth of the southwest made an understanding with Spain of supreme moment. The year 1795 witnessed a treaty between Spain and the United States in which the subjects at issue were handled and compromised in a broad and generous spirit.²³

. . . And his Catholic Majesty has likewise agreed that the navigation of said river, in its whole breadth from its source to the ocean, shall be free only to his subjects and the citizens of the United States, unless he should extend this privilege to the subjects of other Powers by special convention.

. . . And in consequence of the stipulations contained in the IV article, His Catholic Majesty will permit the citizens of the United States, for the space of three years from this time, to deposit their merchandize and effects in the port of New Orleans, and to export them from thence without paying any other duty than a fair price for the hire of the stores; and His Majesty promises either to continue this permission, if he finds during that time that it is not prejudicial to the interests of Spain, or if he should not agree to continue it there, he will assign to them on another part of the banks of the Mississippi an equivalent establishment.

But the French Revolution and the rise to power of Bonaparte not only disturbed Europe, but threatened to, and actually did, replace Spain as neighbor in the southwest.

Bonaparte was no sooner master at home than he looked abroad and sought to re-establish France as a colonial power. As a stepping-stone to America,

²³ Articles IV, XXII, Treaty with Spain, 1795.

Santo Domingo would be occupied; from this as a basis, Louisiana would next fall before sword or diplomacy, or perhaps both.

Fortunately for this country, Toussaint L'Ouverture delayed the French army of occupation, and fever finally destroyed it. The plans of Bonaparte regarding Louisiana became known in Great Britain as well as in America. The happy moment passed and almost before Louisiana was ceded to France, policy if not wisdom dictated its relinquishment to this country.

Louisiana had been ceded to Spain in 1763 as compensation for the loss of the Floridas which Spain was forced to hand over as the price of peace to Great Britain. But France looked longingly to the vast area whose very name proclaimed its French origin. Threats of force and intrigue persuaded Charles IV of Spain to sign the Treaty of San Ildefonso on October 1, 1800, by which Spain was to cede Louisiana to France in return for the spoils in Italy, to be erected into the Kingdom of Tuscany for a Spanish Infanta. But Spain had no intention to transfer possession to another than France, and France was forced to pledge herself "not to alienate the property and usufruct of Louisiana." A year passed and France was not in possession, but on the 15th of October, 1801, the order was signed transferring Louisiana.

The privilege of deposit at New Orleans was, according to the treaty of 1795, for three years, so that

it might expire in 1798. As a matter of fact, it continued in practice for another term of three years, when the Spanish representative in Louisiana, acting upon an intimation from Madrid that "after all, the right to deposit was only for three years," closed the Mississippi to America, on October 28, 1802.

The fall of 1801 found Louisiana legally though not actually a province or colony of France and the Mississippi closed to commerce. A weak and constantly retreating neighbor had given place to a great and warlike nation, from whose grasp New Orleans could only be conquered, if at all, at the expense of national prosperity. Jefferson, writing to Livingston in April, 1802, said:²⁴

The cession of Louisiana and the Floridas, by Spain to France, works most sorely on the United States. On this subject the Secretary of State has written to you fully. It completely reverses all the political relations of the United States and will form a new epoch in our political course. There is on the globe one single spot the possessor of which is our natural and habitual enemy. It is New Orleans, through which the produce of three-eighths of our territory must pass to market, and from its fertility it will ere long yield more than half of our whole produce and contain more than half of our inhabitants. France, placing herself in that door, assumes to us the attitude of defiance. Spain might have retained it quietly for years. Perhaps nothing since the Revolutionary war has produced more uneasy sensations through the body of the nation.

The moment was indeed critical, but Jefferson's passion for peace and Bonaparte's passion for war

²⁴ Writings of Thomas Jefferson, vol. VIII, 143.

resulted in the cession of the whole territory for the lump sum of \$15,000,000. The immediate agent in securing the transfer was Livingston. It is true that Monroe was sent to Paris to assist both Livingston and Pinckney, the minister to Spain, in "enlarging and more effectually securing our rights and interests in the river Mississippi and in the territories eastward thereof." At this time New Orleans and West Florida were the utmost in Jefferson's mind; the acquisition of Louisiana was scarcely dreamed of.

The appointment of Monroe quieted the country, much inflamed by the closure of the Mississippi, and in that respect it was no doubt wise; but as an aid to Livingston, Monroe was useless. Monroe was essentially a follower; the strong man led, and in this instance the strong man was Livingston. The most that can be said is that Monroe approved Livingston's treaty and that he actually signed it. The terms of it were practically settled before Monroe reached Paris and there is no reason to believe that the terms would have been different, or that the treaty would have been delayed had the earth opened and swallowed up Monroe.

In speaking of Jefferson and the appointment, Mr. Henry Adams says: ²⁵

He deserved success, although he hardly expected to win it by means of Monroe, whom he urged to go abroad, . . . not so much to purchase New Orleans as to restore political quiet at home. For the purchase of New Orleans, Livingston was fully

²⁵ Henry Adams, *History of the United States*, vol. I, 434-435.

competent; but the opposition at home, as Jefferson candidly wrote to him, were pressing their inflammatory resolutions in the House so hard that "as a remedy to all this we determined to name a minister extraordinary to go immediately to Paris and Madrid to settle the matter. This measure being a visible one, and the person named peculiarly popular with the western country, crushed at once and put an end to all further attempts on the legislature. From that moment all has been quiet."

To return to Livingston and his purchase. The wary Chancellor was on the spot with his hand on the pulse, ready to note change and take advantage of it. The failure of the St. Domingo expedition and project disgusted Bonaparte, and Louisiana which was to feed the Island Colony became less desirable. Then too he was at peace, and peace must be got rid of at any price. As Mr. Adams points out: "Attention had to be drawn from failure in St. Domingo, and from the surrender of the remnant of the French army he had deserted and destroyed in Egypt." A continental war with French armies crossing the Rhine, the Alps, or the Pyrenees was a necessity. The long meditated blow was to be struck.²⁶

March 12, Livingston saw a melodramatic spectacle which transfixed him with surprise and excitement. The scene was at Madame Bonaparte's drawing room; the actors were Bonaparte and Lord Whitworth, the British ambassador. "I find, my Lord, your nation wants war again," said the First Consul. "No Sir," replied Whitworth; "we are very desirous of peace." "*I must either have Malta or war!*" rejoined Bonaparte. Livingston re-

²⁶ Henry Adams, *History of the United States*, vol. II, 19.

ceived these words from Lord Whitworth himself on the spot; and returning at once to his cabinet, wrote to warn Madison. Within a few days the alarm spread through Europe, and the affairs of St. Domingo were forgotten.

The meaning of this was clear: the truce, rather than the peace of Amiens was at an end. Louisiana might be retroceded to Spain; it could not remain a French possession so long as Great Britain controlled the sea. In case of war America might seize the province and risk a war with Bonaparte. "If you can obtain Louisiana,—well!" said Addington to Rufus King, the American minister to the Court of St. James; "if not, we ought to prevent its going into the hands of France."²⁷ This was likewise evident to Bonaparte, and following the methods of the shopmen, for whom he professed contempt, he sold what he could no longer keep.

On April 11, Talleyrand, before the arrival of Monroe, offered the whole of Louisiana, and two days later, at midnight, Livingston practically closed with Barbé-Marbois, to whom the negotiation had been transferred. Monroe had reached Paris on the 12th, but Livingston was unwilling to share his credit with a newcomer whose mission was either to quiet the public at home or to supplant him in Paris, or perhaps both. Marbois's price was sixty million francs with assumption of American claims against France to the amount of twenty millions more. Liv-

²⁷ Henry Adams, *History of the United States*, vol. II, 24.

ingston wrote at once to Madison, lest the supplanter might rob him of his laurels.²⁸

I speak without reflection and without having seen Mr. Monroe, as it was midnight when I left the Treasury Office, and it is now near three o'clock. It is so very important that you should be apprised that a negotiation is actually opened, even before Mr. Monroe has been presented, in order to calm the tumult which the news of war will renew, that I have lost no time in communicating it. We shall do all we can to cheapen the purchase; but my present sentiment is that we shall buy.

And buy they did—a week spent in haggling failed to change the figures. The original terms of Marbois were accepted and on the 30th of April, the bargain was struck. Two days later the treaty was actually signed, but was antedated to the 30th of April. The Claims Convention, creditable to neither Livingston nor Monroe, occupied a week, but it too bears the same date as the Treaty. It was loosely drawn, but as Livingston truly said:²⁹

The moment was critical; the question of peace or war was in the balance; and it was important to come to a conclusion before either scale preponderated. I considered the convention as a trifle compared with the other great object; and as it had already delayed us many days, I was ready to take it under any form.

From the foregoing account it will be evident that circumstances were stronger than the will or craft of any one man, be he ever so skilled or clever; that

²⁸ Henry Adams, *History of the United States*, vol. II, 32.

²⁹ Henry Adams, *History of the United States*, vol. II, 46.

the war storm would of itself have blown the fruit from the tree without any shaking. It is, however, a fact, that Livingston was on the spot; that he eagerly watched and waited for the psychological moment and that when this came he seized the fruit with a bold hand. No one man is indispensable; another in his place might have done as well, just as any hardy sailor might have put westward and discovered the new world. The historical fact is that the man Columbus sailed westward, and it is no less the fact that Livingston by a stroke of the pen added "Louisiana with the same extent that it had when France possessed it," to the Republic of the United States.³⁰

The parties to the treaty fully appreciated its

³⁰ The province of Louisiana added 1,171,931 square miles to the area of the United States, comprising Alabama and Mississippi south of parallel 31; all Louisiana, Arkansas, Missouri, Iowa, and Nebraska; the entire area of the two Dakotas, and nearly all of Montana; the State of Minnesota west of the Mississippi, and Kansas except the southwest part south of the Arkansas; Colorado and all of Wyoming east of the Rocky Mountains and Indian Territory. (Johnston's American Political History edited by Woodburn, vol. I, 266.)

Livingston insisted that the United States took Louisiana "with the same extent that it now has in the hands of Spain and that it had when France possessed it" (Treaty, Act I). As the eastern boundary of Louisiana until 1763 was the Perdido River, the United States insisted that the river bounded the cession on the east. To avoid war with Spain, this claim was not forcibly asserted until 1810, when possession was taken of West Florida with the exception of Mobile. Two years later the Pearl River was made the eastern boundary of Louisiana and the balance of West Florida was annexed to Mississippi Territory. In 1813, General Wilkinson occupied Mobile and the whole of West Florida passed into the strong hands of the United States. It should not be forgotten that Livingston's diplomacy made this possible.

world-wide significance. For example, Bonaparte is reported to have said: "This accession of territory strengthens forever the power of the United States and I have just given to England a maritime rival that will sooner or later humble her pride."

Chancellor Livingston, although he had been a member of the committee appointed to draft the Declaration of Independence, rightly considered the treaty the noblest monument of his life. Speaking to Monroe and Marbois, he said with prophetic sagacity:

We have lived long, but this is the noblest work of our whole lives. The treaty which we have just signed has not been obtained by art or dictated by force. Equally advantageous to the two contracting parties, it will change vast solitudes into flourishing districts; from this day the United States take their place among the powers of the first rank. The English lose all exclusive influence in the affairs of America. Thus one of the principal causes of European rivalries and animosities is about to cease. The United States will re-establish the maritime rights of all the world, which are now usurped by a single nation. These treaties will thus be a guarantee of peace and concord among commercial States. The instruments which we have just signed will cause no tears to be shed; they prepare ages of happiness for innumerable generations of human creatures. The Mississippi and Missouri will see them succeed one another and multiply, truly worthy of the regard of Providence, in the bosom of equality, under just laws, freed from the errors of superstition and the scourges of bad government.

To this may be added the just and measured language of Henry Adams:³¹

³¹ Henry Adams, *History of the United States*, vol. II, 48-49.

He could afford to suffer some deduction from his triumph; for he had achieved the greatest diplomatic success recorded in American history. Neither Franklin, Jay, Gallatin, nor any other American diplomatist was so fortunate as Livingston for the immensity of his results compared with the paucity of his means. Other treaties of immense consequence have been signed by American representatives,—the treaty of alliance with France; the treaty of peace with England which recognized independence; the treaty of Ghent; the treaty which ceded Florida; the Ashburton treaty; the treaty of Guadeloupe Hidalgo,—but in none of these did the United States government get so much for so little. The annexation of Louisiana was an event so portentous as to defy measurement; it gave a new face to politics, and ranked in historical importance next to the Declaration of Independence and the adoption of the Constitution,—events of which it was the logical outcome; but as a matter of diplomacy it was unparalleled, because it cost almost nothing.

With the signing of the treaty Livingston's work was done; the work of a lifetime spent in public service.³² But the closing years of his life give him an added claim to remembrance.

For years Livingston had been interested in applying steam as a motive power to boats as a means of

³² It is not without interest to note that Mr. Jefferson did not believe that Congress had the power to acquire territory and that an amendment to the Constitution would be necessary. "Our peculiar security is in possession of a written Constitution. Let us *not* make it a blank paper by construction." This was the language of the theorist and dreamer. As President and man of affairs, the Constitutional scruple yielded to the exigency of the moment. "We should do *sub silentio* what shall be found necessary." To the Secretary of State (Madison) he wrote: "The less we say about Constitutional difficulties respecting Louisiana the better, and that which is necessary for surmounting them must be done *sub silentio*."

It is familiar history how the treaty was dragooned through the

navigation. In 1797 he made an experiment on the Hudson, but the boat would not run successfully. Two years later he wrote a long letter on the subject to his old friend Jefferson, in which he set forth his views and described various experiments. So convinced was he of the feasibility of the project that he obtained from the legislature of his state a grant of the exclusive right, for the period of twenty years, to navigate the waters of the state on condition that he should launch and keep running at regular intervals a boat of the average speed of not less than four miles an hour. In 1803 this right was renewed but the conditions were not fulfilled within the prescribed two years.³³

Failing again, the Legislature again renewed the grant, which they had probably concluded by this time as a standing joke, and were no doubt considerably surprised, when in 1807, the terms of the agreement, at that time existing, having been complied with, Livingston and Fulton became the monopolists of steam navigation on all the waters within the limits of the state of New York.³²

The exclusive grant figures in a variety of cases in New York and in the Supreme Court of the United States. Of this phase of the transaction the late Professor Thayer said: ³⁴

Senate. It is also the single instance of a President forcing through Congress a measure which he believed to be unconstitutional. The truth is that Jefferson was a statesman and dreamer; he was not a constitutional lawyer.

³³ Clermont or the Livingston Manor, p. 134.

³⁴ Cases on Constitutional Law, vol. I, 266.

In *Livingston and Fulton vs. Van Ingen*,³⁵ it was held that statutes of New York granting to the plaintiffs the exclusive rights of navigating the waters of that State in vessels propelled by steam, were not in violation of the Constitution of the United States; and the same doctrine was afterward held in *Gibbons vs. Ogden*.³⁶ This doctrine was overruled by the Supreme Court of the United States, on error, in *Gibbons vs. Ogden*,³⁷ so far as concerned vessels licensed under the statutes of the United States for regulating the coasting trade, and navigating between New York and other States; and in *North River Steamboat Co. vs. Livingston*,³⁸ as regards vessels similarly licensed and navigating merely the waters of New York.

These various grants are interesting as showing the length as well as the practical nature of the interest Livingston took in the matter.

The appointment to France and the duty of looking after the first consul and his minister, Talleyrand, did not lessen Livingston's enthusiasm. Indeed the residence in France not only whetted his desire, but supplied the means of realizing his ambition. Fulton's head was full of the subject and Fulton was living in Paris at the time of Livingston's ministry. The two met and the steamboat was the result of their coöperation.

They experimented on the Seine, and, returning to the United States, the *Clermont*, named after the Chancellor's home, was built, and on September 7, 1807, successfully performed the epoch-making trip

³⁵ 9 Johnson's Reports, 519 (1812).

³⁶ 17 Johnson's Reports, 488 (1820).

³⁷ 9 Wheaton's Reports, 1 (1824).

³⁸ 3 Cowen's Reports, 713 (1825).

from New York to Albany, a distance of one hundred and fifty miles, in the space of thirty-two hours. "Fulton's Folly" was really Fulton's wisdom and the world's profit. Well might Gouverneur Morris prophetically exclaim: "A bird hatched on the Hudson will soon people the floods of the Wolgal and cygnets, descending from an American swan, glide along the surface of the Caspian Sea."

It is frequently said that Fulton supplied the brains and Livingston the money. This is epigrammatic but wide of the mark. Livingston was as much enlisted in the cause as was Fulton and had experimented years before meeting Fulton. The two heads were better than one, as the association proved, and the encouragement and money of Livingston built and launched the first successful steamboat which the ingenuity of both devised.³⁹

With the successful trip of the *Clermont*, Chancellor Livingston's life ceases to have a public interest. He lived on in graceful and useful retirement until February 26, 1813.

The foregoing sketch has failed of its purpose if it has not shown that Livingston deserves well of his country and his countrymen, who rejoice in an independence and liberty he asserted and helped to

³⁹ "Chancellor Livingston, who had, by his own experiments, approached as near success as any other person, who, before Fulton had attempted to navigate by steam, and who had furnished all the capital necessary for the experiment, had plans and projections of his own." *Clermont or the Livingston Manor*, p. 123.

found, upon a soil largely won by his diplomacy without taking the life of a human being or shedding a drop of blood.

It is gratifying to quote the eulogy of friendship and to know that it is true: "Gentle, and courteous in his manners, pure and upright in his morals. His benefactions to the poor were numerous and unostentatious. In life without reproach, victorious in death over its terrors."

In person the Chancellor was tall, of commanding presence, of patrician dignity, and his statue in bronze, true to the life, fitly stands in the capitol of his state and also in that of his country.

